THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*V.R.Krishna Iyer, R.S. Pathak and O. Chinnappa Reddy, JJ.*

T.V.Mahalinga Iyer .. *Appellant**

v.

The State of Madras and another
.. *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 6 (20) —*Temple if public or private—Presumption and Proof.*

It is undisputed law that so far as Tamil Nadu is concerned there is an initial presumption that a temple is a public one, it being up to the party who claims that it is a private temple; to establish that fact affirmatively. Of course, this initial presumption must be rebutted by clinching testimony and the crucial question is as to whether the public worship in the temple as of right.
[*Para.* 2.]

The dedication to the public need not be by a deed and may be spelt out of the circumstances present. The right of the public to worship again is a matter of inference.
[*Para.* 2.]

In the present case the temple itself is situate on government property, processions with the deity are taken out and offerings are made. The structure especially of Gopuram and Mandapam also indicates the public nature of the temple. The evidence in the case also supports the conclusion that there had been contributions made by the public and the temple was not a private one. [*Para.* 2.]

The Judgment of the Court was delivered by

Krishna Iyer, J.—This appeal by certificate turns on the character of a temple in the city of Madras as to whether it is a private temple or a public temple, that is a temple within the meaning of section 6 (20) of the Madras Hindu Religious and Charitable Endowments Act, 1959. The trial Court held in favour of the plaintiff who claimed that the temple was private and brought a suit to set aside the order passed by the Commissioner, Hindu Religious and Charitable Endowments but the High Court reversed the judgment and decree of the trial Court and held that the temple was public in character and the authorities constituted under the Act had jurisdiction to manage the temple on that footing.

2. Shri Balkrishnan, appearing for the appellant, has taken us through the details of the evidence to impress upon us that the High Court had grievously erred in holding that the temple was a public one. It is undisputed law that so far as Tamil Nadu is concerned, there is an initial presumption that a temple is a public one, it being up to the party who claims that it is a private temple to establish that fact affirmatively. Of course, this initial presumption must be rebutted by clinching testimony and the crucial question is as to whether the public worship in the temple as of right. Ordinarily there may not be direct evidence regarding the exercise of such right and inference has to be drawn from a wealth of circumstances. In the present case, the High Court has gone into great detail and taken up circumstance after circumstance to uphold its conclusion that the institution is a public temple. The dedication to the public need not be by a deed and may be spelt out of the circumstances present. The right of the public to worship again is a matter of inference. In the present case, the founder is no more and he died issueless with the result that his family is extinct A will had been executed, by him and the trustees under the will are now claiming the institution as a private temple. The various features referred to by the appellate Court and discussed at some length do not call for

* C.A. No. 1397 of 1972. *6th August*, 1980.

reiteration and we desist from doing so. It may be noted that the temple itself is situate on government property, that processions with the deity are taken out and that offerings are made, that the structure especially of Gopuram and Mandapam also indicates the public nature of the temple. Many other facts have been accumulated by the High Court and the evidence (Exhibit B-1) in the case also supports the conclusion that there had been contributions made by the public and the temple was not a private one. We are not inclined to re-appraise the evidence in this Court as we are thoroughly satisfied that no serious error of law or perspective or mis-appreciation of evidence has been pointed out in the judgment of the High Court. We are, therefore, constrained to reject the case of the plaintiff-appellant that the institution is private or that the deity is a family idol. We accordingly dismiss the appeal.

3. In the peculiar circumstances of the case, we direct that the parties will bear their costs throughout.

V.K. —— *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—*P.N. Bhagwati, A.P. Sen and E. S. Venkataramiah, JJ.*

State of Tamil Nadu .. *Appellant**

v.

Binny Ltd. Madras .. *Respondent.*

Tamil Nadu General Sales Tax Act (*1 of* 1959) *as amended in* (1964), *section* 2(d) (*ii*)—*Textile mill running a store for sale of provisions for its workers — Such sales if assessable to sales tax.*

It is difficult to see how a store run by the owner of a textile undertaking for sale of provisions to the employees in the factory can be said to be anything other than incidental to the business of manufacture of textiles. The sales are therefore, transactions falling within the definition of business in setion 2 (d) (*ii*) and hence attracts the liability to tax under the Tamil Nadu General Sales Tax Act, 1959. [*Para.* 3.]

Cases referred to:—

Deputy Commissioner of Commercial Taxes v. *Thirumagal Mills Ltd.*,(1967) 20 S.T.C.287; *State of Tamil Nadu* v. *Burma Shell Co., Ltd.*, (1933) 3 S.C.C. 511 : (1973) 2 S.C.R. 636: 31 S.T.C. 426 : A.I.R. 1973 S.C. 1045; *Royal Talkies* v. *Employees' State Insurance Corporation*, (1979)1 S.C.R. 80 : (1978) 4 S.C.C.204: (1978) Lab. I.C. 1245 : (1978) Lab. L.J. 390 : A.I.R. 1978 S.C.1478.

The Judgment of the Court was delivered by

Bhagwati, J.—The only question which arises for consideration in this Appeal by certificate is whether sales of provisions effected by the assessee in a workmen's store maintained by it are assessable to tax under the Tamil Nadu General Sales Tax Act, 1959. The assessee carries on business of manufacture and sale of textiles in a factory situate in the State of Tamil Nadu. It is one of the leading manufacturers of textiles in the country. It is running a store in the premises of the factory where workmen

* C.A. No. 757 (T) of 1973. 1*st August*, 1980.

can buy provisions. In the course of assessment of the assessee to sales tax for the assessment year 1967-68 under the Tamil Nadu General Sales Tax Act, 1959 the question arose whether the sales effected by the assessee in the store were taxable. The assessee contended that in respect of the sales effected by it in the store it was not carrying on a business within the meaning of section 2 (*d*) the Act because there was no profit motive in running the store and this activity was being carried on by it only for the purpose of providing a facility to workmen. This contention was negatived by the Sales Tax authorities and they brought the sales of provisions in the store to tax. The assessee carried the matter in appeal to the Tribunal where the assessee succeeded and this led to the filing of a revision application by the State before the High Court. The High Court by a brief order dismissed the revision application and following its earlier decision in *Deputy Commisioner of Commercial Taxes* v. *Thirumagal Mills Ltd.*[1] held that the sales in question were not taxable. The State thereupon preferred the present appeal after obtaining the necessary certificate from the High Court.

2. Now, it may be pointed out at the outset that the decision in the *Thirumagal Mills case*[1] on which the High Court relied for deciding the present question in favour of the assessee, has been subsequently overruled by this Court in *State of Tamil Nadu* v. *Burma Shell Co. Ltd.*,[2] The view taken by the High Cout in *Thirumagal Mills Case*[1] was that sales effected in a fair price shop maintained by the assessee were not taxable even after the amendment made in the Tamil Nadu General Sales Tax Act, 1959, with effect from 1st September, 1964, because the activity carried on in the fair price shop was not of a commercial nature and did not partake of the character of business. This view did not find favour with the Court in the *Burma Shell case*[2] and in the judgment delivered in that case Jaganmohan Reddy, J., speaking on behalf of the court, pointed out that the view taken in *Thirumagal Mills case*[1] did not take into account the word "such" in clause (*ii*) of section 2 (*d*) of the Act and the Madras High Court was in error in holding that in order to come within clause (*ii*) of section 2 (*d*), it was necessary to show that the transaction had the characteristics of business. Section 2 (*d*) as it stood after its amendment from 1st Septemder, 1964, defined 'business' in the following terms:

> "Section 2 (*d*).—"business' includes (*i*) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and (*ii*) any transaction in connection with, or incidential or ancillary to, such trade, commerce, manufacture, adventure or concern."

3. This Court observed in the *Burma Shell case*[1] that for the purpose of attracting the applicability of clause (*ii*) of section 2 (*d*), it was not necessary that the transaction in question must partake of the characteristics of business but it was sufficient if it was "in connection with or incidental or ancillary to such trade, commerce, manufacture, adverture or concern". The word "such" in clause (*ii*) was in the opinion of the Court, referable to trade, commerce, manufacture, adventure or concern referred to in clause (*i*) and if there was in existence some trade, commerce, manufacture, adventure or concern falling within clause (*i*), any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern, would constitute 'business' within the meanning of clause (*ii*) even though the transaction by itself may not have the characteristics of business as understood in ordinary parlance. Now, the business which was carried on by the assessee was manufacture of textiles and the transaction of sale of provisions in the store were, in the submission of Mr. S. T. Desai appearing on behalf of the State, in connection with or incidental to such business. This contention was seriously disputed by Mr. Ramachandran on behalf of the assessee and he urged that there was no connec-

1. (1967) 20 S.T.C. 287 (Mad.)
2. (1973) 3 S.C.C. 511: (1972) 2 S.C.R. 636: 31 S.T.C. 426: A.I.R. 1973 S.C. 1045,

1. (1973) 3 S.C.C. 511: A.I.R. 1973 S.C. 1045,

tion between the activity of manufacture of textiles carried on by the assessee and the sales of provisions in the Store maintained by it nor was it possible to say that the sales effected by the assessee were incidental to the manufacture of textiles. Mr. Ramachandran contended that in order to attract the applicability of clause (*ii*) of section 2 (*b*) it was necessary that the connection between the sales of provisions in the Store and the manufacture of textiles must be direct and such direct connection was, according to him wanting in the present case. We do not think the contention of Mr. Ramachandran is at all justified. It is indeed difficult to see how it can at all be said that the activity of selling provisions to the workmen in the store was not incidental to the business of manufacture of textiles in the factory. The sales which were effected in the Store were to the workmen employed in the factory where textiles were being manufactured and the provision of this facility to the workmen was certainly incidental to the carrying on the business of manufacture of textiles. This view finds support from the decision of this Court in *Royal Talkies, Hyderabad* v. *Employees' State Insurance Corporation*[1] where the question was as to whether a canteen maintained by a cinema owner in the premises of the cinema could be said to be incidental to the business of running the cinema, Krishna Iyer, J., speaking on behalf of the Court, pointed out that "a thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either". Applying this test the Court held that it was impossible to contend that "a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinemagoers ordinarily find such work an advantage, a facility, an amenity and some times a necessity. All that the Statute requires is that the work should not be irrelevant to the purpose of the establishment". Now, if a canteen maintained by a cinema owner for the benefit of cinemagoers can be regarded as incidental to the purpose of the cinema theatre which is to carry on the business of exhibiting films in the theatre, we fail to see how a Store run by the owner of a textile undertaking for sale of provisions to the workmen employees in the factory can be said to be anything other than incidental to the business of manufacture of textiles. We are clearly of the view that the activity of selling provisions to workmen in the Store was incidental to the business of manufacture of textiles and the sales were, therefore, transactions falling within the definition of 'business' in clause (*ii*) of section 2 (*d*). We must, in the circumstances, hold that the assessee carried on business of selling provisions in the store and the sales attracted the liability to tax under the Tamil Nadu General Sales Tax Act, 1959 as it existed during the year of assessment.

4. We accordingly allow the appeal, set aside the judgment of the High Court as also the order made by the Tribunal and restore the order of the Sales Tax authorities holding that the sales in question were assessable to tax under the Tamil Nadu General Sales Tax Act, 1959. The assessee will pay the costs of the appeal to the State.

V.K. ——— *Appeal allowed.*

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1. (1978) 4 S.C.C. 204: (1978) Lab. I.C. 1245: (1978) 2 Lab L.J. 390: (1979) 1 S.C.R 80: A.I.R. 1978 S.C. 1478.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*N.L. Untwalia, P.N. Shinghal and V.D. Tulzapurkar, JJ.*

M/s. Anna Transport Corporation Ltd. .. *Appellant**

v.

Regional Transport Authority, Dharmapuri and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 68-*F* (1-D), *Proviso —Effect of section* 68-*F* (1-*D*) —*Proviso, when applicable.*

By virtue of the clear provision of sub-section (1-D) of section 68-F of the Motor Vehicles Act, 1939 no permit could be granted or renewed during the period intervening between the date of publication of the scheme under section 68-C and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service. The proviso to section 68-F (1-D) would be applicable only if the period of operation of the permit expires after the publication of the scheme prepared under section 68-C. [*Para.* 8.]

Case referred to :—

Cheran Transport Co., Ltd v. *Kanan Lorry Service,* (1977) 2 S.C.J. 66 : (1977) 1 S.C.C 604 : (1977) 2 S.C.R. 389 : A.I.R. 1977 S.C. 1564.

K. Parasaran, Solicitor-General of India (*A.V. Rangam,* Advocate with him), for Appellant.

T. S. Krishnamurthy Iyer, Senior Advocate, *Srinivasan* and *A.T.M. Sampath,* Advocates with him), for Rspondents.

The Judgment of the Court was delivered by

Shinghal, J.— These appeals by special leave are directed against a common judgment of the Madras High Court dated 22nd August, 1977, in three revision petitions against the orders of the State Transport Corporation, Madras, dated 16th February, 1977, by which the High Court allowed the revision petitions and remitted the cases to the Regional Transport Authority for fresh consideration in the light of its observations. The High Court directed further that the revision petitioners before it as well as the present appellant-Corporation would continue to provide transport facilities on the route in question until the disposal of the renewal applications of the revision petitioners.

2. The facts of the three appeals are quite simple and are not in controversy. They have been heard together at the instance of the learned counsel for the parties and will be disposed of by this common judgment.

3 The controversy relates to the plying of vehicles on the Salem-Krishnagiri route. The facts of one of the three cases have been placed for our consideration by the learned counsel for the parties and they have informed us that they are sufficient for the adequate disposal of all the appeals.

4. Balkrishna Bus Service and Company respondent No. 2, was a private operator on the aforesaid route. Its permit was due to expire on 9th October, 1974, and it applied for its renewal within the time prescribed by law. Its application was notified on 5th June, 1974, under section 57 (3) of the Motor Vehicles Act. Objections to the renewal application were filed by the Anna Transport Corporation Limited, which is the present appellant, on 25th June, 1974. The Corporation, at the same time, also applied for the grant of a permit to it. A controversy, therefore arose in the matter and the Regional Transport Authority fixed 21st December, 1974, for its hearing. The case was, however, adjourned. Balakrishna Bus Service and Co., in the meantime, filed a writ petition and challenged the validity of Rule 155-A of the Motor Vehicles Rules of the State and obtained a stay of the hearing of the matter which was pending before the Regional Transport Authority. A draft scheme for the route from Mettur to Kallakurichi *via* Omalur and Salem was published on 4th June, 1976, and it formed a sector of the Salem-Krishnagiri route. The validity of aforesaid Rule 155-A was finally upheld by the High Court on 29th June, 1976. It, therefore, dismissed the writ petition and directed the Regional Transport Authority to dispose of the pending application for renewal within a month. The Regional Transport Authority rejected that application on 30th October, 1976, and granted a permit to the present appellant. The State Transport Appellate

* C.A.Nos. 2780-2782 of 1977. 23rd July, 1980.

Tribunal confirmed that order. The matter was taken to the High Court in revision and that led to the passing of the impugned judgment.

5. The facts are, therefore, quite simple. There is no controversy about them, and they are sufficient for the disposal of the present appeals by special leave.

6. It is not disputed before us that the section applicable to the controversy is section 68-F of the Act. The High Court, in fact, not only decided the revision petitions with reference to that section but, rightly took the view that the controversy before it fell within the purview of sub-section (1-D) thereof. It however, held on a reading of this Court's decision in *Cheran Transport Co. Ltd.* v. *Kanan Lorry Service*[1], that the case fell within the purview of the so-called "rider" to proposition No. 2 set out in that judgment with reference to the proviso to sub-section (1-D) of section 68-F of the Act. The sub-section reads as follows:

> "(1-D) Save as otherwise provided in sub-section (1-A) or sub-section (1-C), no permit shall be granted or renewed during the period intervening between the date of publication, under section 68-C of any Scheme and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service in relation to an area or route or portion thereof covered by such scheme:
>
> Provided that where the period of operation of a permit in relation to any area, route or portion thereof specified in a scheme published under section 68-C expires after such publication, such permit may be renewed for a limited period, but the permit so renewed shall cease to be effective on the publication of the scheme under sub-section (3) of section 68-D."

7. It is not in controversy that sub-section (1-A) or sub-section (1-C) of section 68-F are not applicable to the controversy. The rest of sub-section (1-D) provides that no permit shall be granted or "renewed". during the period intervening between the date of publication under section 68-C of any scheme and the date of publication of any approved or modified scheme in favour of any person in relation to an area or route or portion thereof covered by that scheme.

8. As has been stated, a draft scheme of road transport service of the appellant Corporation was published on 4th June, 1976, under section 68-C of the Act and as has been mentioned, that scheme overlapped a section of the Salem-Krishnagiri route. It follows, therefore that by virtue of the clear provision of sub-section (1-D) of section 68-F of the Act, no permit could be granted or renewed during the period intervening between the date of publication of the aforesaid scheme under section 68-C that is after 4th June, 1976, and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service. The High Court, therefore, clearly went wrong in thinking that the case fell within the purview of the proviso to sub-section (1-D) and it consequently erred in taking into consideration the so-called rider to proposition No.2 mentioned in this Court's judgment in *Cheran's case*[1]. The proviso would have been applicable only if the period of operation of the permit of the respondents had expired after the publication of the scheme prepared under section 68-C; but that was not so in this case. It has also to be remembered that in this case it was the respondent (private operator) who filed a fruitless writ petition and prevented the disposal of the renewal application for a long time by obtaining a stay order. On a plain reading of sub-section (1-D) of section 68-F of the Act, we have, therefore no hesitation in allowing the appeals with costs. We may, however, add that if no approved or modified scheme has been published so far, the proper course for the Regional Transport Authority would be to keep the three renewal applications pending and not to treat them as dismissed. The stay orders are vacated.

V.K. —— *Appeals allowed.*

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1. (1977) 2 S.C.J. 66 : (1977) 1 S.C.C. 604: (1977) 2 S.C.R. 389: A.I.R. 1977 S.C. 1564.

1. (1977) 2 S.C.J. 66 A.I.R. 1977 S.C. 1564.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:— *R. S. Sarkaria and R.S.Pathak, JJ.*

State of Tamil Nadu and others .. *Appellants**

v.

M. N. Sundararajan .. *Respondent.*

Fundamental Rules, Rule 56 (d)—*Section Officer of Tamil Nadu Secretariat—Review Committee for reviewing cases of non-gazetted officers—If competent to recommend compulsory retirement.*

The effect of the Tamil Nadu Government Order No.1782, Public (Services-J.), dated 27th June, 1973, was that although the Superintendents were given a gazetted status and their designations were changed into Section Officer with effect from 13th June, 1973, in all matters relating to appointments, transfers, postings, punishments and drawal of pay, they continued to be treated as non-gazetted Government servants until further orders. That being so, notwithstanding the conferment of gazetted status, a Section Officer continued to be governed, *inter alia*, in the matter of 'appointment' which would include compulsory retirement or termination of service also, by the Rules and Government Orders applicable to non-gazetted officers of the Secretariat and therefore the review committee presided over by a Departmental Secretary, set up for reviewing the cases of non-gazetted officers of the Secretariat is fully competent to consider the case of a Section Officer and recommend his retirement. [*Paras.* 8, 10.]

Cases referred to:—

Manager, Government Branch Press v. *D. B. Belliappa*, (1979) 2 S.C.R. 458 : (1979) 1 S.C.C. 477 : A.I.R. 1979 S.C. 429 ; *State of Uttar Pradesh* v. *Chandra Mohan Nigam*, (1978) 1 S.C.R. 521 : (1977) 4 S.C.C. 345 : A.I.R. 1977 S.C. 2411.

A. V. Rangam, Advocate, for Appellants.

Ramalingam, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sarkaria, J.—Special leave to appeal granted.

2. The respondent herein, M.N. Sundararajan was recruited as a Clerk in the Indian Army in the year 1943. Sometime after the regiment was demobilised he was appointed in the Revenue Secretariat of the State Government from March, 1948 in a vacancy reserved for war service candidates. He was promoted as Section Officer in April, 1969 and he continued in the post till, 2nd March, 1976, when he was compulsorily retired from service by the appellant-State in exercise of its power under Fundamental Rule 56 (*d*).

3. The respondent challenged the validity of the order of his compulsory retirement by a writ petition under Article 226 of the Constitution in the High Court of Madras. One of the grounds of challenge was that as per procedure set out in G. O. No. 761, dated 19th March, 1973, the Review Committee has to consider the cases of Gazetted Government Officers in the Secretariat headed by the Chief Secretary and not by the Departmental Secretary; and that, therefore, the order passed by the appellant-State based on the review made by a Committee which had no jurisdiction cannot be sustained in law.

4. Following a previous decision in W.P.No. 1547 of 1977 (The Jawahar Mill's case), the High Court held that since the Committee which reviewed the respondent's case was not a Committee duly constituted under G.O.No.761 dated 19th March, 1973, and had not been presided over by the Chief Secretary, there was a violation of the procedure laid down by the Government in G.O.No.761 dated 19th March, 1973, and this violation had vitiated the impugned order passed by the Government In the result the writ petition was allowed and the impugned order was quashed. Hence, this appeal by special leave.

5. The main contention of the learned Solicitor-General who has appeared on behalf of the appellant-State, is that the High Court has not correctly appreciated the import of the relevant Government Orders. It is submitted that under Government Order No. 1782, Public (Services-J), dated 27th June, 1973, all Superintendents or Section Officers were given the status of Gazetted Officers with effect from 13th June, 1973, "but, in all matters relating to *appointments*, transfers postings, punishments and drawal of pay,"

*C.A. No. 1743 of 1980. *19th August*, 1980.

they continued to be treated as non-Gazetted Government servants "until further orders". That was why, the case of the respondent pursuant to the aforesaid Government Order of 27th June, 1973, for compulory retitement under Fundamental Rule 56 (*d*) was considered by the appropriate Committee constituted for non-Gazetted Government servants in the Secretariat. In the aforesaid Government Order, dated 27th June, 1973, the word 'appointments' according to the learned Solicitor-General includes compulsory 'retirements' also. In support of his contention, he has referred to the decisions of this Court in *Manager, Government Branch Press* v. *D. B. Belliappa*[1] and *State of Uttar Pradesh* v. *Chandra Mohan Nigam*[2].

6. On the other hand, Shri Srinivasan, appearing for the respondent submits that the word 'appointments' in the Government Order No. 1782, dated 27th June, 1973, cannot be construed to include 'retirements' from or 'terminations' of service. If that had been the intention, it is argued, there was no difficulty in adding the word 'retirements' or 'terminations' along with the words "appointments, transfers, postings and punishments" in that Government Order. It is urged that a restricted interpretation should be placed on this expression.

7. Thus the short question that falls to be considered is: was the High Court right in quashing the order of the respondent's compulsory retirement, who was a Gazetted Officer at the material time, merely on the ground that it was considered by a Review Committee other than the one constituted for Gaztted Officers.

8. For the sake of perspective, it is necesary to recall that before 27th June, 1973, a Section Officer in the Tamil Nadu Secretariat used to be a non-Gazetted Officer. In 1972 and earlier, several representations were made by the Tamil Nadu Secretariat Associations and others that the Superintendents of the Secretariat should be accorded gazetted status. Ultimately the Government by order Government Order Ms. No. 1616, Public (Services-J) dated 13th June, 1973, made the post of a Superintendent of the Secretariat a Gazetted post with effect from the date of that order. Such Superintendents were re-designated as Section Officers. In the aforesaid Government Order, it was stated that the amendment to the said Rule should be issued shortly. Since the framing of the Rules involved lot of administrative complications and unavoidable delay, the Government took a policy decision that in regard to various procedures concerning such newly designated Section Officers, the Rules under which they were functioning earlier, namely, Rules applicable to non-Gazetted Government servants should continue to apply till such time as Service Rules are made with a view to avoid administrative dislocation. This decision was the subject of Govt. Order No. 1782, Public (Services-J), dated 27th June, 1973. The net effect of this Order was that although the Superintendents were given a gazetted status and their designations were changed into Section Officers with effect from 13th June, 1973, *but in all matters relating to appointments, transfers, postings punishments and drawal of pay, they continued to be treated as non-gazetted Government servants until further orders.*

9. The question is, whether the expression "appointment" used in this Government Order, dated 13th June, 1973, will include 'termination' of service or 'compulsory retirement' from service, also. It is a fundamental principle of interpretation that unless a contrary intention appears from the context, a power to appoint should include a power to terminate the appointment, including termination of the person appointed by his compulsory retirement in accordance with the terms and conditions of his service. This fundamental principle underlies section 16 of the General Clauses Act. In other words, the power to terminate the appointment by compulsory retirement or otherwise is a necessary adjunct of the power of appointment and is exercised as an incident to or consequences of the power. There is nothing in the Government Order No. 1782, dated 27th June, 1973, which militates against this rule of construction.

10. The above being the true construction of the word 'appointments' in the aforesaid Government Order of 27th June, 1973, notwithstanding the conferment of gazetted

1. (1979) 1 S.C.C. 477: (1979) 2 S.C.R. 458: A.I.R. 1979 S.C. 429.
2. (1977) 4 S.C.C. 345: (1978) 1 S.C.R. 521: A.I.R. 1977 S.C. 2411.

status, the respondent continued to be governed *inter alia* in the matter of 'appointment', which would include compulsory retirement or termination of service also, by the Rules and Government Orders applicable to non-gazetted Officers of the Secretariat and therefore, the Review Committee presided over by a Departmental Secretary, set up for reviewing the cases of non-gazetted Officers of the Secretariat was fully competent to consider the case of the respondent and recommend retirement.

11. Assuming that there was some irregularity in the constitution of the Review Committee, which dealt with the case of the respondent, that could not affect the validity of the impugned orders. The "decisions" of the Review Committee had no force *proprio vigore.* At best, the 'decisions' were mere recommendations which did not, and could not, have a peremptory effect. The ultimate power to accept or not to accept the recommendations of the Review Committee and to take an effective and definitive decision in the matter, vested in the Government. Thus, even if there was some irregularity in the constitution of the Review Committee, the functions of which were purely advisory that could not by itself have the effect of vitiating the order of the respondent's compulsory retirement, passed by the Government in the exercise of the power vested in it.

12. Furthermore, it was not the respondent alone (from the category of Section Officers) whose case was reviewed by the Review Committee in question. The cases of all the Section Officers of the Secretariat were reviewed by the same Committee. It could not, therefore, be contended that the respondent had been singled out for a differential treatment. Article 14 of the Constitution was not attracted and the respondent could not have any grievance on that score.

13. For the foregoing reasons, we allow this appeal set aside the order of the High Court and uphold the order of the respondent's compulsory retirement. The parties shall pay and bear their own costs.

V.K. —— *Appeal allowed.*

[END OF VOLUME (1981) 1 M.L.J. (S.C.)]

S. Natarajan and
V. Sethuraman, JJ.

Dr. A. V. Natarajan *v.*
Indian Bank.

24th September, 1980.

C.R.P. No. 1199 of 1980.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 66—*Execution—Auction sale — Fixation of upset price by Court—Includes power to reduce upset price—Introduction of second proviso by Act, CIV of* 1976—*Right of Court not infringed—Scope of rule* 66.

The Court's power to fix an upset price for the property, which included within it a right to reduce the upset price wherever necessary, had not only been available to the Court all through, but such a right is an irremovable one, and the said right has not been infringed in the least by the second proviso introduced by Act, CIV of 1976. When the Court fixed an upset price, the Court was not determining the rights of any of the parties before it, and the fixation of the upset price was only for facilitating the conduct of the sale and, at the same time, safeguarding the interests of the judgment-debtor by fixing a reserve price. Notwithstanding the fixation of the upset price and notwithstanding the fact that a bidder had offered an amount higher than the upset price it would still be open to the judgment-debtor to approach the executing Court and adduce proof that the property had been sold for a low price on account of some material irregularity or fraud in the publication or conduct of the sale and have the sale set aside.

N. Natarajan and *V. Nicholas,* for Petitioners.

G. Venkataraman, for Respondent.

S.J. ——— *Petition dismissed.*

M. M. Ismail, CJ. and
M. A. Sathar Sayeed, J.

The Tamil Nadu Electricity Board, represented by its Secretary, Madras *v.*
Tamil Nadu Electricity Board Accounts and Executive Staff Union by its General Secretary.

22nd September, 1980.

W.A. No. 501 of 1980.

Constitution of India (1950), *Article* 226—*Employees Union — Grant of recognition by employer—Recognition granted in respect of ministerial staff excluding peons, bill collector and storekeepers — Subsequently union enrolling members from peons, bill collectors and storekeepers also—Union recognised by employer — Union explaining that it represents and bargains for ministerial staff excluding peons, bill collectors and storekeepers — Explanation not accepted by employer — Order of derecognition—Order challenged by Union under Article 226—Writ of* certiorari *issued—Appeal by employer dismissed.*

The respondent was accorded recognition by the appellant and paragraph 3 of the order stated as follows:

"The Tamil Nadu Electricity Board accepts the recommendation of the Commissioner of Labour, Madras and hereby accords recognition under the Code of Discipline in Industry to the Tamil Nadu Electricity Board Accounts Subordinates Union, Coimbatore (Reg. No. 2422) in respect of the ministerial staff excluding peons, bill collectors and storekeepers".

Subsequently the Union started enrolling members from peons, bill collectors and storekeepers also. In view of this, the appellant proposed to derecognise the union as having violated the condition of the recognition. The union pointed out that though it had changed

its name and changed its coverage in the sense of extension of membership, it had not changed its representative capacity and as a bargaining agent, was still continuing to represent and bargain only for the ministerial staff excluding peons, bill collectors and store-keepers. Notwithstanding this explanation of the union, the appellant derecognised the union. It was against these proceedings the union filed the writ petition which was allowed and the appellant filed the present writ appeal.

The appellant contended that the recognition granted was not under any statute and that the Code of Discipline in Industry was itself not statutory.

Held: It was not disputed that the grant of recognition conferred a status on a body like the respondent union to represent the workers in a particular category, with reference to their service conditions, with the management; in other words, it becomes a bargaining agent on behalf of the group of workers with reference to which it was recognised. Withdrawal of that status or recognition would certainly bring about adverse consequences on a body like the respondent—union, and with reference to such adverse consequences, even in respect of an order of withdrawal like the one made by the appellant if it was illegal or was in violation of the principles of natural justice, certainly a body like the respondent—union could approach the High Court under Article 226 of the Constitution of India.

In this case, from the correspondence that passed between the parties it was clear that the respondent—union did not claim any right to represent peons, bill-collectors and store-keepers, but continued to represent only the ministerial staff and though it claimed a right to extend the coverage in the sense of extension of membership, it stood by the earlier order of recognition confirming its representative capacity or bargaining power only in respect of the ministerial staff. If so, there was no violation of the conditions of recognition.

The High Court was of the opinion that the withdrawal of recognition was made on an erroneous basis that there had been a violation of the conditions of recognition, since the respondent took up the stand that its capacity under the recognition as a body to represent only the ministerial staff remained unchanged.

M. R. Narayanaswamy, for Appellant.

S.J. ——— *Appeal dismissed.*

V. Balasubrahmanyan, J.

Muthiakudi Anandar *v.* Govindan.

18*th November,* 1980.

C.R.P. No. 646 of 1979.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *(as amended by Act XXIII of* 1975), *sections* 10 (3) (iii)—*Petition for eviction by landord—Allegation of building required for purpose of business of his foster son—Petition, whether maintainable.*

Held, that the landlord cannot ask for eviction of the tenant in occupation of the building on the ground that the building is required for purpose of business of his foster son, since the foster son would not come under the term "any member of his family".

M. N. Krishnaswami, for Petitioner.

R. Srinivasan, for Respondent.

R.S. ——— *Petition allowed.*

S. Natarajan and
V. Sethuraman, JJ.

Kanni Ammal *v*. The Tamil Nadu State Wakf Board, represented by the Secretary.

24th October, 1980.

L.P.A. Nos. 108 to 118 of 1976.

Tamil Nadu Court-fees and Suits Valuation Act (*XIV of* 1955), *sections* 25 *and* 52—*G. O.* 1617, *reducing court-fee payable in suits to recover possession of wakf property—Extension of the concession to appeals by G.O.* 232—*Suit by Wakf Board to recover possession of property—Allegation of property being wakf property—Fixed court-fee paid as per G. O.—Appeal by defendant to High Court—Same court-fee paid—No objection by Wakf Board regarding court-fee—Appeal dismissed—Letters Patent Appeal — Same court-fee paid — Preliminary objection by Wakf Board regarding court-fee—Whether maintainable.*

Held, following the decision reported in *Sri Ratna Varanaraj* v. *Smt. Vimala*, (1961) 3 S.C.R. 1015: A.I.R. 1961 S.C. 1299, the failure on the part of the Wakf Board to have raised the question of court-fee before the learned single Judge makes the contention a vulnerable one. The first respondent could not be allowed to obstruct the progress of the Letters Patent Appeal by raising a technical objection at this belated stage. Preliminary objection overruled.

R. Srinivasan, K. Srinivasan and *K. Raghunathan*, for Appellant.

The Additional Government Pleader, for State.

S. M. Haneed Mohideen, for Respondent No. 1.

R.S. ——— *Ordered accordingly.*

M. M. Ismail, CJ. and
M. A. Sathar Sayeed, JJ.

The Regional Commissioner, Employees' Provident Fund, Tamil Nadu and Pondicherry State *v*. The Management of Southern Alloy Foundries (P.), Limited, Madhavaram.

1st September, 1980.

W.A. No. 254 of 1980.

Employees' Provident Fund and Family Pension Act (*XIX of* 1952), *sections* 2 (b) (ii) *and* 6—*Special allowance paid by employer to employee—Whether forms part of dearness allowance.*

Clause 2 (*b*) of the Employees' Provident Fund and Family Pension Act, 1952, defines the term "basic wages". This definition "includes a number of allowances grouped in sub-clause (*ii*) of sub-section (*b*) of section 2. However under section 6, dearness allowance and retaining allowance were taken into account for the purpose of calculating contribution. The rationale behind the exclusion of special allowance under section 6 was considered by the Supreme Court in *Bridge and Roofs Co., Ltd.* v. *Union of India*, (1963) 1 S.C.J. 388: (1963) 3 S. C. R. 978: (1962) 2 L. L. J. 490: A. I. R. 1963 S. C. 1474. The appellant merely stated that as per section 6 of the Employees' Provident Funds and Miscellaneous Provisions Act, the special allowance should also be deemed to be dearness allowance. But he did not give any reason as to why the same should be dearness allowance. It is not the finding of the appellant that the special allowance formed part of dearness allowance, but as he himself states in his order it was only deemed to be dearness allowance. Needless to say that an officer like the appellant has no power to deem special allowance to be something else which is not, it being the prerogative of the Legislature only.

Miss Radha Srinivasan, for Appellant.

R.S. ——— *Appeal dismissed.*

S. Natarajan and
V. Sethuraman, JJ.

R. M. L. L. Lakshmanan Chettiar *v.* V. A. R. Alagappa Chettiar.

18th August, 1980.

A.S. No. 310 of 1976.

Limitation Act (XXXVI of 1963), sections 18 *and* 19—*Acknowledgment of liability—Scope and applicability—Difference between the two sections.*

Section 18 of the Limitation Act, deals with the making of an acknowledgment of a liability before the expiration of the period prescribed for suit or application in respect of a property or right. Section 10 deals with payment on account of a debt or of interest on legacy being made before the expiration of the prescribed period of limitation by the person liable to pay the debt, on legacy or by his agent duly authorised in that behalf, and a fresh period of limitation being computed from the time when the payment was made. The difference between the two sections has been succiently set out in *Parameswaran* v. *Purushothaman and Co.*, A.I.R. 1977 Ker. 132.

Thus while under section 18 there should be an acknowledgment of liability, under section 19 an endorsement of payment need not imply an acknowledgment of liability. The mere fact of payment included by the endorsement will not have the effect of extending the period of limitation.

K. Rajan, for Appellant.

S. Thiagaraja Iyer, for Respondent.

R.S. ——— *Appeal allowed.*

M. M. Ismail, CJ. and
S. Nainar Sundaram, J.

Karuppanna Chettiar *v.* K. Ramachandran.

6th August, 1980.

C.R.P. Nos. 2113 and 2142 of 1979.

Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), *sections* 3 (4) (a) *and* 6-*B*—*Cultivating tenant—Petition for eviction by landlord — Allegation of wilful default in payment of rent—Tenant agreeing to pay the arrears of rent on or before a particular date—Joint endorsement by landlord and tenant—Order passed by the Authorised Officer in terms of the joint endorsement — Failure to deposit to result in eviction order being passed —Direction not complied with — Eviction order passed — Revision against the order—Interim stay of execution of the order of eviction asked for — Conditional order passed—Condition complied with — Effect of compliance of the conditional order.*

In the instant case the Authorised Officer passed an order under section 3 (4) (*b*) of the Act XXV of 1955, on the failure of the tenant to deposit the rent within the time specified by his earlier order. From this point of view, the order of the Authorised Officer is unexceptionable. As a matter of fact, the petitioners did not make any complaint against the order of the Authorised Officer on the merits. So long as the order of the Authorised Officer is unexceptionable and is not vitiated by any one of the factors enumerated in section 115 of the Code of Civil Procedure, the High Court will have no jurisdiction to interfere with that order.

The fact that during the pendency of the civil revision petition the tenant applied for and obtained orders of interim stay of the execution of the order of eviction on condition of the deposit of the rent will not in any way invalidate the order passed by the Authorised Officer. The question that has to be considered in respect of default is, not with reference to any date sub-

sequent to the order of the Authorised Officer, but with reference to the date fixed by him prior to his passing the order of eviction. The section itself contemplates the Revenue Divisional Officer giving an opportunity to the tenant to deposit the arrears of rent within such time as he considers just and reasonable and only if the cultivating tenant fails to deposit the same as directed, the Revenue Divisional Officer can pass an order for eviction, and in terms of an earlier order either independent or conditional. In view of this, the default contemplated by the statutory provision is one occurring and existing on the date of passing of the order for eviction by the Revenue Divisional Officer himself and not at any stage subsequent to the said order. If the cultivating tenant does not deposit the rent as directed, default, has occurred and there is no question of that default being cured or wiped out by the tenant depositing the rent pursuant to any interim order of eviction and any such deposit made during the pendency of the proceedings in the High Court will be in compliance with the interim order of the High Court and can never be a deposit in compliance with the original order of the Revenue Divisional Officer. As a matter of fact, the High Court is not concerned in such proceedings with the original default committed by the cultivating tenant in payment of the rent to the landlord. It is because of this original default, the Revenue Divisional Officer directs the tenant to deposit the rent in the civil Court before a particular date and the subject-matter of the civil revision proceedings in the High Court therefore will not be the original default, but only the failure of the tenant to comply with the decision of the Revenue Divisional Officer. Once that failure is admitted the consequential order of the Revenue Divisional Officer is unexceptionable; there will be no occasion for the High Court to give an opportunity to the cultivating tenant to comply with the original direction of the Revenue Divisional Officer to deposit the amount, because the original order no longer stands and the order has worked itself out in the form of a final order of eviction, which on merits is not challenged. If this matter is understood in this manner, certainly any deposit made by the tenant in terms of the interim order of stay passed by the Court staying the execution of the order for eviction passed by the Authorised Officer can never be tantamount to compliance with the conditional order passed by the Authorised Officer.

M. Veikkaran v. *Nellathammal,* (1972) 2 M.L.J. 17: 85 L.W. 376, overruled.

M. R. Narayanaswami, for *V. Natarajan* and *V. Nicholas,* for Petitioner in C.R.P. No. 2113 of 1979.

T. Somasundaram and *A. S. Venkatachalamurthy,* for Petitioner in C.R.P. No. 2142 of 1979.

M. Srinivasan, for *V. R. Venkataraman* and *V. R. Karthikeyan,* for Respondents.

R.S. —— *Revision petition dismissed.*

G. Ramanujam and

V. Sethuraman, JJ.

Ponnuswamy *v.*

The Tamil Nadu State Wakf Board, through its Secretary

22nd August, 1980.

A.S. No. 466 of 1976.

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), *section* 25 (a) *and section* 52 — *G.O. Ms. No.* 1742, *dated 9th July,* 1969 — *Concession to Wakf Board in paying court-fee—Suit for recovery of wakf property — Fixed court-fee paid — Appeal by defendant — Whether G. O. can be taken advantage of.*

The Government Order reducing the court-fee payable by the Wakf Board in a suit filed by the Board for recovery of possession of wakf property from third parties to Rs. 15 will not apply to the defendant in a suit who files an appeal against the decision rendered in such a suit. Section 52 of the Tamil Nadu Court-fees and Suits Valuation Act states that the fee payable in an appeal shall be the same as the fee that would be payable in the

Court of first instance on the subject-matter of the appeal. The explanation does not use the expression "the fee that was paid in the Court of first instance" but uses the words "the fee that would be payable on the relief in the Court of first instance". The fact that the Wakf Board was entitled to pay the fixed court-fee of Rs. 15 in a suit filed for recovery of the wakf property will not enable the defendant when he files the appeal against the judgment in that suit to pay the same fixed court-fee as that will not be the fee payable on the relief in the Court of first instance if the suit were to be filed by the defendant. In this view of the matter the appellant herein has to pay court-fee *ad valorem* on the market value of the property under section 25 (*a*) as the suit has been filed for declaration of title and for possession of the property.

R. Nadanasabapathy, for Appellants.

S. M. Hameed Mahideen, for Respondent.

R.S. ——— *Appeal dismissed.*

V. Balasubrahmanyan, J.

Wazirunnissa Begum *v.*
S. Mohamed Haneef.

5th September, 1980.

C.R.P. No. 746 of 1979.

Co-owner—Co-owner owning a fractional share in property filing suit for ejectment — Other co-sharers not added as parties to the suit—Defendant claiming to be purchaser of the rest of the property—Suit whether maintainable.

Held, that in this case the remedy of the petitioner would have been, not in a suit for ejectment, but in a suit for partition as against the respondent. The fact that the respondent had not proved his claim of having purchased the rest of the shares in the suit land does not therefore lead to a different result. The weakness in the petitioner's suit was that as a co-owner of only a quarter share in the suit property she yet sought to evict the respondent from the property as a whole, without the other sharers being associated, along with her, in her action. This cannot be done.

K. Kumaraswamy, for Petitioner.

Mustafa, for Respondent.

R.S. ——— *Revision dismissed.*

M. M. Ismail, CJ. and
R. Sengotuvelan, J.

Veda Patasala Trust, Sooramangalam *v.* State of Madras.

12th November, 1980.

C.R.P. Nos. 1012, 1453 of 1976 and C.R.P. Nos. 146, 532, 804 of 1979.

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), *section* 2 (1) (ii)*—Trusts created for running Vedapatasala — Religious trust of public nature—Provisions of the Act will not apply.*

A common question was raised in these Civil Revision Petitions, namely, whether the public trusts involved in running a Vedapatasala would come within the scope of section 2 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. The imparting of instructions in Vedas and Agamas is certainly of a religious nature. Therefore, whenever a trust which is of a public nature provides for the imparting of instructions in Vedas and Agamas, certainly, that will be a religious trust of a public nature and imparting of instructions in Vedas and Agamas cannot be anything other than of religious nature. The trusts in all these cases will constitute religious trusts of public nature, because the trusts are running Veda Patasalas for imparting instructions in Vedas and Agamas.

Sub-section (3) of section 2 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, clearly points out that where a public trust has been created both for a public purpose of a religious nature and for any other public purpose or the income from the public trust in existence on the date of the commencement of the Act is appropriated both for public purpose of a religious nature as also for any other public purpose, such public trust shall be deemed to be a religious trust of a public nature. Consequently with regard to all these trusts on the basis of section 2 (1) (*ii*) read with section 2 (3) of the Act, the provisions contained in the Act will not apply.

T. R. Ramachandran and *B. Rajagopalan,* for Petitioner.

The Advocate-General, for Respondents.

R.S. —— *Petitions allowed.*

P. R. Gokulakrishnan and
P. Venugopal, JJ.

Mrs. Parimal Devi *v.* R. Jayachandran.

12th November, 1980.

W.P. No. 3463 of 1980.

(A) *Hindu Minority and Guardianship Act (XXXII of* 1956), *section* 6 (a)*—Claim for custody of minor male child of tender age—Father having custody—Petition to issue writ of* certiorari*—Civil Court has jurisdiction to go into the question—Petition dismissed.*

(B) *Constitution of India* (1950), *Article* 226 *—Writ of* habeas corpus*—Alternative remedy available—Writ petition misconceived.*

Considering the decision in several cases and bearing in mind the provisions of the Guardians and Wards Act and the Hindu Minority and Guardianship Act, the proper forum for the present case will be the Court constituted under the above two Acts and not the High Court exercising writ jurisdiction under Article 226 of the Constitution of India. The High Court's jurisdiction to grant relief under Article 226 of the Constitution can be invoked only in cases where the other remedies available will not be as effective and efficacious as the one sought to be invoked under Article 226. So far as the present case is concerned, as per law, the father is the natural guardian. Technically the custody has to be with the mother if the child is below the age of five. It is only a preferential claim as between the father and mother as regards the custody of the child. These is no extraordinary circumstance in this case to relief under Article 226 of the Constitution of India. The relative merits of the claim for custody have to be discussed and decided after hearing the proper evidence that will be let it by the respective parties. This can be effectively done before the civil Court constituted under the Hindu Minority and Guardianship Act and also under the Guardians and Wards

Act. The Court can give an effective and efficacious relief after assessing the evidence that may be let in by the respective parties regarding their preferential claims over the child concerned. Inasmuch as there is an effective alternative remedy available for the petitioner to agitate her claim, the writ petition filed under Article 226 of the Constitution is misconceived.

R. Subramanian, for Petitioner.

V. Sridevan, for Respondent.

R.S. ——— *Writ petition dismissed.*

T. Sathiadev, J.

T. N. Krishnamoorthy *v.* M|s. Jagat Textiles.

31st October, 1980.

Review C.M.P. No. 2822 of 1980 in C.R.P. No. 2612 of 1979.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25—*Revision—Procedure to be followed by High Court—No procedure prescribed under Act (XVIII of* 1960)—*Code of Civil Procedure to be followed — Review competent being specifically provided in Civil Procedure Code.*

When the High Court has been conferred with powers to entertain a revision under section 25 of the Tamil Nadu Act XVIII of 1960, as held in *Thirupathi Nadar* v. *Kandaswami Nadar,* (1968) 81 L.W. 643, when a Court is invested with powers to adopt the procedure applicable to it, there is necessity for invoking the Code of Civil Procedure. No procedure having been contemplated in the Rules, to be adopted by the High Court and when the High Court in a Court of record the necessary implication is, the Court will have to decide the revision petitions by following the Civil Procedure Code.

The power of revision conferred under section 25 of the Act, XVIII of 1960, is on 'the High Court' and while entertaining the revision it exercises the power of a Court created under the Constitution. Ii is not a *'persona designata'*. When power is conferred on a Court, and no other special procedure is prescribed for disposal of matters under a particular statute, as held in *P. N. Thakershi* v. *Pradyumansinghji,* A. I. R. 1970 S.C. 1273; by such conferment of power, there is necessary implication that the Code of Civil Procedure, would apply and in turn the power of review would be available to the High Court.

T. R. Mani, for Petitioner.

Aiyar and *Dolia,* for Respondent.

S.J. ——— *Review petition allowed.*

A. Varadarajan, J.

P. Karunakaran *v.* V. M. Ponnuswamy Achari.

7th November, 1980.

C.R.P. No. 2865 of 1980.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25—*Evidence—Admissibility or otherwise of by trial Court—Revision filed against trial Court's ruling — Not desirable to admit revision — Mistake by trial Court, if any, to be rectified at the Appellate stage—Civil Procedure Code (V of* 1908), *section* 115.

No progress can be made in the trial Court if civil revision petitions are admitted against the ruling given by the trial Court about the admissibility or otherwise of a particular piece of evidence, as the trial Court may have innumerable occasions to allow or disallow any particular piece of evidence during the trial of a suit or other proceedings. The mistake, if any, committed by the trial Court in the admissibility or otherwise of a particular piece of evidence can be rectified by moving the appellate Court in an appeal against the order or decree which may be ultimately passed by the trial Court after taking into consideration or declining to take into consideration the particular piece of evidence.

R. S. Venkatachari, for Petitioner.

S.J. ——— *Petition dismissed.*

G. Ramanujam, J.

Ariyur Narasimhan Temple *v.*
T. N. Sundaramoorthy Pillai.

28th November, 1980.

C.M.A. No 447 of 1978.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959*), section* 63 (b)—*Rival claimants to the office of trusteeship before Deputy Commissioner — Deputy Commissioner has no jurisdiction to decide as between rival claimants to a hereditary trusteeship.*

Section 63 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, enables a Deputy Commissioner to enquire into and decide as to "whether a trustee holds or held office as a hereditary trustee". It is by now well-settled that the jurisdiction of the Deputy Commissioner under section 57 (*b*) of the Hindu Religious and Charitable Endowments Act of 1951 corresponding to section 63 (*c*) of Tamil Nadu Act XXII of 1959, is confined to a decision whether a trustee holds or held office as a hereditary trustee, *i.e.*, that decision should be in relation to the status of the office of the trusteeship, namely whether it is hereditary or not and that it is not competent for the Deputy Commissioner to go into the further question as to who among the competing claimants is a hereditary trustee as the matter is not covered by the above provision. This is clear from the decision *Krishnaswami Raja* v. *Krishna Raja,* (1968) 1 M.L.J. 149 and *Rengayya Gounder* v. *Kannappa Naicker,* (1971) 1 M.L.J. 358. In view of the above decisions, the question as to who as between the rival claimants is the hereditary trustee cannot be decided by the Deputy Commissioner under section 63 (*b*) of Tamil Nadu Act XXII of 1959, as, if such a decision is rendered by him, the same cannot bind the civil Court which has to decide independently on the evidence adduced by the parties.

R. Gandhi, M. Kamalanathan and *G. Sivabalanathan,* for Appellant.

R. Alagar and *W. C. Thiruvengadam,* for Respondent.

R.S. ——— *Appeal dismissed.*

S. Padmanabhan, J.

S. Arunachalam *v.*
The State of Tamil Nadu.

4th November, 1980.

W.P. Nos. 1048 to 1051 of 1977.

Tamil Nadu Water Supply and Drainage Board Act (IV of 1971*), sections* 30 *and* 31—*Applicability.*

The petitioners joined the Tamil Nadu Water Supply and Drainage Board as Junior Engineers. The Board was constituted in the year 1970. Section 30 of the Tamil Nadu Water Supply and Drainage Board Act, provides that every person who immediately before the notified date is serving in connection with the affairs of the Department of Public Health Engineering and Municipal Works including the office of the Chief Engineer under the Government shall as from the date be deemed to have been allotted to serve in connection with the affairs of the Board and shall cease to be an employee of the Board subject to two provisions. Section 31 of the Act provides that as soon as may be after the notified date, the Government may after consulting the Board direct by general or special order that such of the empolyees other than those employees referred to in section 30, serving immediately before the said date in connection with the affairs of the State as are specified in such order shall stand allotted to serve in connection with the affairs of the Board with effect from such date as may be specified in such order. Section 31 (*b*) of the Act provides that with effect on and from the date specified in the order under clause (*a*) the persons specified in such order shall become employees of the Board and shall cease to be employees of the Government.

In 1977, the Government issued an order transferring respondents 3 to 8 to the control of the Board. The Government order further stated that the said respondents shall stand allotted to serve in connection with the affairs of the Board with effect on and from 19th March, 1977. In Board's proceedings dated 22nd January, 1977, the seniority of all the petitioners was recognised and they were included in the panel of names considered fit

for promotion as Assistant Executive Engineers in the service of the Board. By proceedings dated 22nd March, 1977 in C3/76511/76-3 the petitioners were promoted temporarily as Assistant Executive Engineers in the Board. However, by Board's proceedings M. S. M. 110 dated 26th April, 1977, respondents 3 to 8 were promoted temporarily as Assistant Executive Engineers and the petitioners were reverted. Writ petitions were filed to quash the order of the Board.

Held, that the transfers and allotment of respondents 3 to 8 to the service of the Board has been specifically made under section 31 of the Act. The specified date is 19th March, 1973. In the circumstances it goes without saying that the petitioners are entitled to claim seniority over respondents 3 to 8. Applying the principles laid down in the judgment in W.P. No. 1204 of 1977, *N. Basheer Ahmed* v. *Government of Tamil Nadu* the writ petitions were allowed.

S. Rangarajan, for Petitioner.

The Government Pleader, for Respondent.

R.S. —— *Petition allowed.*

S. Nainar Sundaram, J.

S. Balasubramanian *v.* Gulab Jan.

5th December, 1980.

C.R.P. No. 1624 of 1979.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973)—Sub-tenant — Status under the Act—Petition for eviction against original tenant—Tenant remaining ex parte *—Consent by sub-tenant—Disputing* bona fide *of landlord to obtain possession—No allegation of fraud or collusion between the main tenant and landlord—Sub-tenant, whether can defeat the provision of eviction by landlord.*

If the landlord makes out a case for eviction under the Act against the main tenant, the sub-tenant cannot have any voice in such a contingency and has to abide by the decision in the action taken against the landlord by the tenant. The sub-tenant cannot put-forth any grievance since the Act confers upon him no protection whatsoever and his right to be in possession is in the very nature of things, very nebulous and is a defeasible right. In the present case, the sub-tenant had not put-forth and substantiated any plea of collusion between the landlords and the main tenants. Section 26 of the Rent Control Act is only an enabling provision and it does not affect the well-established principle that a sub-tenant has no independent right of his own to be protected under the Act and in the absence of contest by the main tenant for valid reasons and in the absence of fraud or collusion between the landlord and the main tenant, it is not permissible for the sub-tenant to stultify the proceeding for eviction by the landlord by putting forth any independent consent of his own. In this case it must be presumed that the main tenant found no justifiable and vital excuse or ground to contest the petition for eviction by the landlord and in the said circumstances, it is not within the competency of the sub-tenant to put forth a consent and nullify the proceedings for eviction by the landlord.

N. Sivamani and *N. K. Mitra*, for Petitioner.

K. Ramaswami, *A. Sarojini Bai* and *S. Rangarajan*, for Respondent.

R.S. —— *Revision allowed.*

G. Ramanujam, J.

Arumugha Nadar *v.* Kumara Pillai.

26th November, 1980.

A.A.O. No. 403 of 1977.

Tamil Nadu Agriculturists Debt Relief Act (IV of 1938) (as amended by Act VIII of 1973), section 3 (2) (a)—Agriculturist — Debtor having saleable interest in agricultural property—Creditor proving that debtor had interest in other properties as well — Onus shifting to debtor to prove that he does not come under the definition of agriculturist.

Held, that in this case the property mortgaged by the original debtor was salt pans with reservoirs, wells etc., which were being exploited under a licence. The order of the Court appointing the Official Receiver as the property guardian of the first defendant who was the son of the original debtor clearly showed that the first defendant was possessed of not only a saleable interest in agricultural lands but also possessed considerable extent of coconut garden and considerable extent of salt pans and also a small factory in Tuticorin with a licence for manufacturing salt. The possession of an extensive coconut thope would involve an assessment under the Agricultural Income-tax Act. Working of the salt pans and manufacture of salt would have involved the first defendant to an assessment to profession tax as well as income-tax. In these circumstances, it is for the first defendant to prove by producing the accounts and other materials that the possession of the coconut thope did not involve any liability to agricultural income-tax and that the salt manufacturing did not involve him in any liability by way of profession-tax or income-tax. But he had not produced any material in that regard. As the Court below had erroneously proceeded on the basis that the onus was always on the creditor to prove that the debtor is not an agriculturist and as the lower Court had not adverted to the proper aspect of the case, in the interest of justice the matter should be remitted back to the lower Court.

M. S. Umapathy of Raj and *Raj,* for Appellant.

Miss O. K. Sridevi, for Respondent.

R.S. ——— *Appeal allowed and remanded.*

V. Ratnam, J.

M. S. Hameed *v.* Kanniammal.

12th November, 1980.

C.R.P. No. 2217 of 1980.

*Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 25 and Civil Procedure Code (V of 1908), section 115 – Petition for eviction by landlord—*Ex parte *order of eviction passed—Petition to set aside* ex parte *order—Conditional order directing petitioner to pay costs on or before a particular date—Costs not paid—Petition dismissed — Revision to High Court against that order — Whether maintainable under section 115, Civil Procedure Code.*

The Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), is a self-contained Act containing provisions for appeal as well as revision and enabling an aggrieved party to challenge the correctness of the order passed by Authorities under the Act in the manner provided thereunder and no more. The resort to section 115 of the Code of Civil Procedure in matters or proceedings arising out of the provisions of the Act cannot be had to test the correctness of the orders passed under the Act. Therefore it may not be appropriate to characterise the provisions of section 115 of the Code of Civil Procedure and section 25 of the Act as mutually exclusive and to hold that the revisional power under section 115 of the Code of Civil Procedure is always available even with reference to the matters arising under the provisions of the Act under which special, but limited provisions are made to question the correctness of orders passed under the provisions of that Act. In view of these considerations, the Civil Revision Petition filed by the petitioner purporting to be under section 115 of the Code of Civil Procedure, cannot be entertained in the High Court.

N. Maninarayanan, for Petitioner.

N. S. Varadachari and *J. Dilipkumar,* for Respondent.

R.S. ——— *Revision dismissed.*

V. Ratnam, J.

K. Venkataraman *v.*
S. Aravamuthan.

2nd December, 1980.

C.R.P. No. 2515 of 1980.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *sections* 10 (2) (i) *and* 10 (3) (a) (i)—*Petition for eviction by landlord — Allegation of tenant committing wilful default and* bona fide *requirement of landlord — Rent Controller ordering eviction on both grounds — Appeal to Appellate authority by tenant—Finding on wilful default confirmed*—Bona fide *requirement negatived—Appeal dismissed—Revision by tenant to High Court—Question of* bona fide *requirement whether can be agitated by landlord — "Person aggrieved"—Meaning.*

Held, that the respondents were persons affected by the findings of the Appellate Authority on the question of *bona fide* requirement, although the ultimate decision was in their favour. Having secured an order in their favour, it is not open to the respondents to prefer an appeal against the decision of the Appellate Authority on this point alone, as the ultimate order is in their favour. A landlord who urges before the Authorities below several grounds to secure an order for eviction against the tenant and succeeds in establishing one of such grounds and fails in others and secures ultimately an order in his favour, is nevertheless a person "aggrieved" with reference to those findings against him, if the ultimate decision of the Authorities is challenged by the opposite party. In addition the functionaries under the Act are within their jurisdiction to enquire into application for eviction, fixation of fair rent, etc., and though the entire procedure applicable to civil Courts, be applied to those Authorities yet rules of justice, equity and good conscience could be invoked to relieve difficulties and avoid situations like the present. In the present case the respondents were not able to persuade the Appellate Authority on the question of *bona fide* requirement which they urged successfully before the Rent Controller. The respondents by the order of the Rent Controller, secured an order for eviction on two grounds and by the order of the Appellate Authority, one of those grounds was taken away, though the ultimate order was in their favour. It may even be stated that the respondents have been relieved of the right to an order of eviction on the ground of *bona fide,* requirement by the Appellate Authority. The respondents would therefore be persons aggrieved in so far as the finding on this aspect went against them before the Appellate Authority. Under those circumstances it is open to the respondents to sustain the order of eviction on that ground as well.

R. G. Rajan, for Appellant.

K. R. Ramabadran, for Respondent.

R.S. ——— *Revision dismissed.*

V. Ramaswami, J.

Pattammal *v.* Kanniammal.

28th November, 1980.

S.A. No. 972 of 1977.

Indian Succession Act (XXXIX of 1925), *section* 63 (c)—*Will—Proof of — Attesting witnesses to admit attestation—Attesting witnesses to prove that they signed in the presence of the testator.*

From the provisions of section 63 (*c*) of the Indian Succession Act, the definition of 'attestation' in section 3 of the Transfer of Property Act and section 68 of the Indian Evidence Act, the execution of a document will have to be proved by calling in at least one of the attesting witnesses and attestation itself has to be proved in the form in which section 63 (*c*) of the Indian Succession Act, requires. Under the provision attestation will have to be proved by the attesting witnesses admitting attestation as also proving that they signed the document in the presence of the testator.

M. Srinivasan, for Appellant.

M. N. Padmanabhan and *D. Mukundan,* for Respondent.

S.J. ——— *Appeal dismissed.*

Ramanujam, J.

Rukku *alias* Rukkumani *v.* Kannan.

10th October, 1980.

A.A.O. No. 336 of 1978.

Civil Procedure Code (V of 1908), *Order* 33, *rule* 5—*Petition for permission to file a suit as an indigent person*—Prima facie *finding to be given by Court on the basis of the pleadings.*

It is no doubt true that the Court whose permission is sought for filing a suit as an indigent person, has to *prima facie* find that there is a cause of action for the plaintiff and the suit is not otherwise barred by law. But this *prima facie* finding has to be given on the basis of the pleadings, particularly with reference to the averments made in the plaint.

M. V. Chandran, for Appellant.

S. Doraiswamy, for Respondents Nos. 1 and 5.

S.J. ——— *Appeal allowed.*

Ramanujam, J.

Janaki Ammal *v.* Alagar Kothan.

25th November, 1980.

A.A.O. No. 394 of 1978.

Tamil Nadu Debt Relief Act (XXXVIII of 1972), *section* 15 (1)—*Application by judgment-debtor on 25th December,* 1973 *for scaling down debt—Act published on 15th December,* 1972 — *Application held to be barred by time.*

The appellant was the decree-holder in a suit and the decree was obtained on 9th March, 1973. The respondent was the judgment-debtor and he filed an application on 25th December, 1973, for amendment of the decree and for scaling down the debt under section 15 (1) of the Tamil Nadu Debt Relief Act (XXXVIII of 1972), which was published on 15th December, 1972. The lower Court allowed the application. The decree-holder challenged the same as barred by time as the application was filed by the judgment-debtor more than 6 months after the date of publication of the Act.

Held:—Having regard to the decision in *Santhanam Ammal and others* v. *K. Srinivasa Ayyangar and Sons* (C.M.S.A. No. 74 of 1977 dated 20th April, 1978), the application filed by the respondent|judgment-debtor on 25th December, 1973 under section 15 (2) of the Act, which was admittedly beyond the period of six months from 15th December, 1972, the date of the publication of the Act as provided in section 15 (1) should be taken to be barred by time.

S. G. Krishnamurthi, for Appellant.

K. Sarvabhauman, for Respondent.

S.J. ——— *Appeal allowed.*

V. Ramaswami, J.

Vijayagopalan *v.* Mahamoyee Ammal.

22nd December, 1980.

S.A. No. 816 of 1977.

Evidence Act (I of 1872), *section* 115—*Document conveying property to another—Attestation by person having interest in the property—Attestation whether would impute knowledge of contents of the document.*

Normally attestation serves the purpose of authenticating the signature of the executant and by mere attestation of a document it may not be possible to impute knowledge of the document and the recitals therein to such attestor. But in a series of cases it has been held that if a person who had some tangible interest in the property affected by the document, attests the same, his attestation should be *prima facie* taken as proof of his consent to and knowledge of the correctness of the recitals in the deed. This was considered to be the peculiar position in this part of the country. The Courts had been consistently following the principle that in such circumstances one should normally presume that the attestor was aware of the contents of the document. It may be taken that if a presumption may be raised by reason of an attestation by a person having a tangible interest in the property; it is always open to the party contending *contra* to show that the attestor did not have any knowledge of the contents of the document and that the circumstances did not warrant such presumption.

G. Ramaswamy for *K. Swamidurai,* for Appellant.

K. Sarvabhauman, for Respondent.

R.S. —— *Appeal dismissed.*

S. Nainar Sundaram, J.

Ahmed *v.* Rukmaniammal.

19th December, 1980.

S.A. No. 2282 of 1977.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 100—*Joint endorsement by parties that dispute about title may be agitated and adjudicated in a regular suit—Petition dismissed in view of endorsement—Order not one against the plaintiff.*

If there has been a reservation with regard to the right claimed and agitated and such rights or claims are not given up by the party or rejected by the Court then the order that terminates such proceedings though worded as one of dismissal, would not amount to an order against the party. The procedure under rule 100 of Order 21 of the Code of Civil Procedure, is only optional and the applicant can always withdraw his application, making appropriate reservation to resort to remedy under the general law of filing a title suit. In the present suit, there was no investigation into or satisfaction reached by the Court that the plaintiff's claim was futile and was liable to be rejected. In the present case, the order of dismissal was the result of a joint endorsement. Both the parties consciously agreed to have the matter agitated and adjudicated in a regular suit. There was no abandonment of rights or claim and the joint endorsement clearly reveals the intention of the party to pursue further the rights claimed.

K. Chandramouli and *S. Ravindran,* for Appellant.

R. Srinivasan, for Respondent.

R.S. —— *Appeal dismissed.*

S. Suryamurthy, J.

T. K. Narayana Pillai *v.*
Naganatha Iyer.

24th October, 1980.

S.A. No. 1486 of 1977.

Tamil Nadu Occupants Kudiyiruppu (Conferment of Ownership) Act (XL of 1971), *section* 2 (6)—*"Kudiyiruppu" — Lease or licence to enjoy should have been only in respect of site—Inapplicable to a pucca building which an agriculturist may take on lease.*

By reason of the definition of "kudiyiruppu" contained in section 2 (6) of the Tamil Nadu Occupants Kudiyiruppu Act, the lease or licence to enjoy should have been only in respect of sites. The definition does not apply to a pucca building which an agriculturist may take on lease. By *Explanation I* to sub-section (8) of section 2 of the Act, a presumption is raised, *viz.,* "any person occupying the kudiyiruppu is an agricultural labourer or an agriculturist until the contrary is proved". To hold that the site of any dwelling house or hut is a kudiyiruppu one has to ascertain whether the occupant either as a tenant or as a licencee is an agriculturist or an agricultural labourer. No presumption that any person is an agricultural labourer can be made till the site of the dwelling house or hut in his occupation is found to be a kudiyiruppu. Therefore the presumption raised by the *explanation* is of no avail to any party who claims to be an agriculturist merely on the basis of a contention that the site in his occupation is a kudiyiruppu. An agriculturist can claim that the site of the dwelling house or hut in his occupation is kudiyiruppu only if he is tenant or a licencee in respect of the site alone.

V. Sridevan, for Appellant.

R.S. ——— *Appeal allowed.*

V. Balasubrahmanyan, J.

Bagiammal *v.*
Subramaniam.

30th January, 1981.

C.R.P. No. 975 of 1980.

Limitation Act (XXXVI of 1963), *section* 5—*Petition to set aside* ex parte *decree—Delay of seventy-nine days — Delay attributed to petitioner being ill with heart disease and jaundice—Court to make humanistic approach—Petition allowed.*

On the question whether a delay of 79 days in filing an application to set aside an *ex parte* decree alleged to be due to petitioner's illness can be condoned.

Held: The Court was entitled to bring to bear a humanistic approach to its decision, once it was convinced that the illeness alleged was real and not feigned. In the instant case the man was past middle age, affected by cardiac trouble and down with jaundice to boot. Both ailments are notoriously serious particularly at this stage of a man's life even if one rules out further complications. Not only is recovery a slow process, but it would call for a period of nursing and prolonged rest in bed. It would not therefore be reasonable to regard the delay in this kind of case as inordinate.

P. Ananthakrishnan Nair and *C. Govindan,* for Petitioner.

J. R. Doss, for Respondent.

R.S. ——— *Petition dismissed.*

Venugopal, J.

Vaithilinga Naicker *v.*

Vivekananda Reddiar.

25*th November,* 1980.

S.A. No. 316 of 1977.

Hindu Law—Joint family property—Mortgage debt created by father for self and as guardian of minor sons—Liability of sons—Pious obligation.

Where the sons are joint with their father and debts have been contracted by the father for his personal benefit, the sons are liable to pay the debt on the principle of pious obligation, if the father's debts are not tainted with illegality or immorality. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation, but a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property. So, even in a case where the debt incurred by the father was not for family benefit or necessity, the doctrine of pious obligation of the son to pay the father's debt would entitle the creditor to bring the whole joint family property to sale for recovery of the debt, provided it is not tainted with illegality or immorality. While considering the power of the father of a joint Hindu family to bind the son's share in respect of a debt incurred for his own personal benefit, Courts have pointed out that the father may mortgage the joint family properties including the son's interest therein to discharge an antecedent debt. The father's power of borrowing so as to bind the son's interest in the joint family property in respect of a debt incurred by him, for his personal benefit has no relevance while considering the doctrine of pious obligation of the son to pay the father's debt not tainted with illegality or immorality. The son's duty to discharge his father's debt not tainted with illegality or immorality cannot be governed or controlled by the father's power to incur debts so as to bind the son's interest in the joint family properties. If the father executes a mortgage to discharge an antecedent debt, it will certainly bind the son's interest in the joint family property and there is hardly any need or scope for invoking the rule of pious obligation in such cases. The doctrine of pious obligation is invoked only where the father executes a mortgage to discharge his own personal debts, not tainted with illegality or immorality.

V. Krishnan and *P. Veeraraghavan,* for Appellant.

K. Sarvabhauman and *K. Sampath,* for Respondent.

S.J. ——— *Appeal allowed.*

Nainar Sundaram, J.

The Liquidator and Co-operative Sub-Registrar (Stores) P-2076, Malapalayam Nehru Multipurpose Co-operative Society *v.* M. S. Sahul Hameed.

17th December, 1980.

S.A. No. 2004 of 1977.

Tamil Nadu Co-operative Societies Rules (1963), *rule* 76 (3)—*Order passed by statutory authority—Order not communicated or made known to party affected—Computation of time for agitation against the order—Time runs only from date of knowledge of the said order by the said party.*

If a statutory authority passes an order without putting the party to be affected on notice of the pronouncement of the order and keeps it in its file without either communicating the same to the party affected or furnishing a copy of the same *suo motu* it will be highly unfair and offending all sense of equity and fairplay to interpret any rule of law with regard to the limitation of time and hold that time for agitation by the party affected must run from the date of the order of which the concerned had no notice at all. In the absence of salutary provisions as found in the Code of Civil Procedure, and in the absence of express Rules governing the proceedings of the statutory authorities, any computation of time with reference to agitation against any order passed by any such statutory authority must definitely run only from the date of the knowledge of the said order by the said party either actually or constructively.

S.J. ——— *Appeal dismissed.*

M. M. Ismail, CJ. and
M. A. Sathar Sayeed, J.

R. S. K. Chandrasekaran *v.* The Official Receiver, Madurai.

15th December, 1980.

L.P.A. No. 9 of 1976.

Provincial Insolvency Act (*V of* 1920), *section* 28—*Secured creditor—Right to realise or deal with security not affected by section* 28 (2) *or* 28 (7).

A combined reading of sub-sections (2), (6) and (7) of section 28 of the Provincial Insolvency Act, will lead to the inference that in the case of a secured creditor his right to realise or otherwise deal with the security will not be affected either by the vesting provided for in section 28 (2) or by the doctrine of relation back provided for in section 28 (7) of the Act.

S.J. ——— *Appeal allowed.*

V. Sethuraman, J.

V. R. Santhanam Iyer *v.* V. S. Sundarathammal.

30th January, 1981.

S.A. No. 2625 of 1977.

Hindu Religious and Charitable Endowments—Hereditary trusteeship of temple—Trustee only a dharmakarta in the context of the case—Widow and brother of land-holder, rival claimants—No mode of devolution prescribed by founder—Succession only to the last holder of the office—Widow would be the heir to the office.

The trustee in the context of the instant case was only a dharmakarta. Regarding succession to the office the law is clear and no other rule of succession can be applied to a case of this kind. There are two ways of devolution of the office of dharmakartha or trustee. As laid down by this Court in *Manaithunainatha* v. *Sundaralingam,* (1970) 2 M.L.J. 156: 83 L.W. 640: I.L.R. (1970) 3 Mad. 624: A.I.R. 1971 Mad. 1 (F.B.), it is possible for a donor to prescribe any mode of devolution of trusteeship, untrammelled by any other

restrictions as regards the nature of the estate. But when he does not do so, devolution is governed by ordinary rules of Hindu Law, statutory or otherwise. The right of succession to office of trusteeship cannot hang in the air. It has to be governed either by the arrangement made by the founder or by the general law. In this case there is no proof of any mode of devolution prescribed by the founder. The succession is thus to the last holder of the office. The widow and not the brother would be his heir.

K. Chandramouli and *S. Kalyanam,* for Appellant.

G. Rangarathinam, for Respondent.

R.S. ——— *Appeal dismissed.*

V. Ratnam, J.

Chattan Pillai Gounder *alias* Palaniappa Gounder *v.*

Additional Commissioner for Workmen's Compensation, Madurai-20.

2nd February, 1981.

C.M.A.S.R. No. 99146 of 1980.

Workmen's Compensation Act (VIII of 1923), *section* 30 (1), (2)*—Appeal to High Court against order of Commissioner—Period of limitation for preparing of appeal—Sixty days—Starting point of time—Date of knowledge of a party as regards the passing of an adverse order.*

The High Court has been constituted as Appellate Authority under section 30 (1) of the Workmen's Compensation Act, and under Order 4, rule 16 of the Appellate Side Rules of the High Court, every memorandum of appeal against an order should be accompanied by an authenticated copy of such other papers as are referred to in Orders 42 and 43 of the Code of Civil Procedure. Under this provision, it is necessary that the appeal against the order of the Commissioner for Workmen's Compensation should be accompanied by a certified copy of the order, as otherwise, it is not possible to ascertain whether the proposed appeal raises any substantial question of law as contemplated by section 30 (1) of the Act under which a right of appeal has been conferred. The party preferring an appeal has, therefore, necessarily to apply for, obtain a certified copy and enclose it along with the memorandum of appeal presented before the Court. Before a party to a proceeding before the Commissioner for Workmen's Compensation can make an application for a certified copy of the order passed, he must have known that the proceedings before the Commissioner has terminated and a party comes to know of such termination of the proceedings only from the receipt of the gist of the order which does not contain the details or the grounds for the decision. It is therefore thereafter that a person who is fixed with the knowledge of the passing of an order by the Commissioner for Workmen's Compensation proceeds to make an application for securing the full text of the order in order to ascertain whether the grounds of decision are correct and whether a substantial question of law would arise. It is therefore, obvious that without obtaining a copy, it is not possible for a party to a proceeding before the Commissioner for Workmen's Compensation to maintain an appeal. It is, therefore, necessary for such a party to obtain a copy of the order passed by the Commissioner. Section 30 (2) of the Workmen's Compensation Act, merely states that the period of limitation for preferring an appeal shall be sixty days, and does not indicate the starting point. Necessarily, it has to be construed as commencing from the date of the knowledge of a party as regards the passing of the adverse order; as otherwise, the limitation cannot commence to run from the date of the uncommunicated order or an order, the contents of which are unknown to a litigant who intends to prefer an appeal against that order.

In the present case it is evident that till 3rd September, 1980, the appellant did not have any knowledge or even the passing of an order by the Additional Commissioner for Workmen's Compensation, and a receipt of that order, within five days thereafter the appellant had made application for a copy of the order and was able to secure the same on 13th October, 1980. Therefore even on the footing that the appellant became aware of the passing of the order on 3rd September, 1980, deducting the time taken by the appellant under section 12 (2) of the Indian Limitation

Act to get a certified copy of the judgment which is a necessary enclosure to the intended appeal, the appeal in the instant case had been preferred on the forty-eighth day and would, therefore be in time. The office is directed to entertain the appeal.

P. Chidambaram and *N. Thiagarajan,* for Appellant.

R.S. ——— *Direction given.*

G. Maheswaran, J.

Thirumalaiappa Gounder *alias* C. Chinnaswamy, *In re.*

9th January, 1981.

Crl. M.P. No. 1653 of 1980.

Criminal Procedure Code, sections 111 *and* 482—*Dispute relating to property — Order under section* 111 *issued on report alleging imminent danger to public tranquillity — Notice not issued—Order liable be quashed.*

Notice under section 111 of the Criminal Procedure Code, has to satisfy a double test. The first is that the notice must furnish all the information which is laid against a person or persons and the second is before issuing a notice, the Magistrate has to satisfy himself that the situation calls for issuing a show cause order. Section 111 requires that the Magistrate acting under section 107 shall make an order in writing setting forth the substance of information received, the amount of the bond, the term for which it has to be in force and the number of sureties required. But a perusal of the order of the Magistrate in the present case shows that the substance of the information received has not been set forth. Even the summons which followed the notice does not contain the information received or at least the essence of the most important part of the information. Consequently it must be held that the notice under section 111 of the Criminal Procedure Code, has not been issued in accordance with the requirement of that section. It is a well-established principle of law that when an act is required to be done in a particular manner, it has to be done in that manner or not at all. For the foregoing reasons, the order under section 111 is liable to be quashed.

V. Natarajan and *V. Nicholas,* for Petitioners.

M. Karpagavinayagam, Government Pleader No. III (Criminal), for State.

R.S. ——— *Petition allowed.*

V. Ratnam, J.

A. G. Kannappa Nadar *v.* V. Krishnaswamy Pillai.

17th February, 1981.

C.R.P. No. 1167 of 1980.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960) *(as amended by Act XXIII of* 1973)—*Petition for eviction by landlord against tenant—Several grounds urged—Separate court-fee for each ground—One ground established—Appeal by tenant—Appellate Authority can go into other grounds also—Payment of court-fee of no consequence.*

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960) *(as amended* by *Act XXIII of* 1973), *section* 10 (2) (ii) (b)—*Putting building to different user by the tenant—Acquiescence by landlord — Estoppel by conduct not a substitute for the plain requirement of the statute.*

(C) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960) *(as amended by Act XXIII of* 1973), *section* 14 (1) (b)—*Change of roof of building from tiles into terrace, is not within the meaning of "Demolition and Reconstruction".*

It is no doubt, true that Order 41, rule 22 of the Code of Civil Procedure, has not been made specifically applicable to proceedings under the Rent Control Act, but even so, the principle underlying that provision has been extended to the hearing of appeals and revi-

sions under the Act. The landlord-respondent in the instant case was undoubtedly, a person affected by the adverse finding of the Appellate Authority, though the ultimate decision was in his favour. Having secured an order in his favour, it was not open to the respondent to prefer an appeal against the decision of the Appellate Authority on the adverse point alone as the ultimate order was in his favour. A landlord who puts forth before the Authorities constituted under the Act several grounds to secure an order for eviction against the tenant, succeeds in establishing one of such grounds and fails in others but ultimately secures an order for eviction in his favour, is nevertheless a person "aggrieved" with reference to those findings against him, if the ultimate decision of the Authorities below is challenged by the opposite party. In addition, the functionaries under the Act are Authorities with jurisdiction to enquire into applications for eviction, fixation of fair rent etc., and though the entire procedure applicable to civil Courts cannot be applied to those authorities, yet the rules of justice, equity and good conscience shall be invoked to relieve difficulties in statutes like the present. It may even be stated that the respondent had been relieved of the right to an order for eviction on all the grounds and would therefore be a person 'aggrieved' in so far as the findings went against him on some points before the Appellate Authority. The grounds upon which an order for eviction may be asked may be many and manifold, but consequent to the findings on the several grounds, the result is neither a dismissal nor an order for eviction and not several such orders based on the different grounds on which the application for eviction is founded. In this view the payment of court-fee for different grounds urged in support of an application for eviction is of no consequence.

In the absence of any permission in writing from the landlord, the question whether the landlord will be precluded from seeking an order for eviction on the ground of acquiescence was considered in *T. O. S. Abdul Khader v. G. H. Rao,* 77 L.W. 503. It has been held therein that any kind of acquiescence by the landlord or estoppel by his conduct cannot be a substitute for the plain requirement of the statute about a written consent and in the absence of such written consent, the landlord is entitled to evict a tenant for having used the building for a purpose other than the one for which it was leased out.

In the present case the proposal to remove the existing damaged tiled roof in the first floor and to convert it into a Madras terrace cannot be within the expression "demolition and reconstruction", as a change of the roof of the building from tiles into a Madras terrace would not amount to demolishing the building and putting up a new building on the site of the building. The renewal of the damaged staircase and the proposal to put up another staircase instead also cannot be included within the expression "demolition and reconstruction".

E. Padmanabhan, for Petitioner.

N. Sankaravadivel, for Respondents.

R.S. ——— *Revision petition dismissed.*

V. Ratnam, J.

Shriram Chits and Investments (P.), Ltd., represented by its Executive Director, T. Jayaraman *v.* S. Padmanabhan.

12th January, 1981,

C.R.P. Nos. 2078 and 2079 of 1980.

Civil Procedure Code (*V of* 1908), *Order* 20, *rule* 11 (2)—*Scope — Proceedings initiated long after the coming into force of Act* (*CIV of* 1976)—*Amended provisions to apply — Payment of decree amount in instalments — Consent of decree-holder not obtained — Court nevertheless ordering payment in instalments—Order liable to be set aside.*

Whatever might have been the position prior to the amendment of the Code of Civil Procedure by Act CIV of 1976, now under Order 20, rule 11 (2), the Court after the passing of the decree is empowered to pass an order directing the payment of the decree amount in instalments on an application by the judgment-debtor and with the consent of the decree-holder and on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as the Court thinks fit. Section 97 (1) of the Act CIV of 1976, declares that any amendment made, or any provision inserted in the principal Act, by the High Court before the commencement of Act CIV of 1976, except in so far as the amendment or provision is consistent with the provisions of the principal Act, as amended by Act CIV of 1976, by the Civil Procedure Code, shall stand repealed. Section 97 (2) of Act CIV of 1976, which saves the applicability of some of the provisions introduced by Act CIV of 1976, does not include Order 20, rule 11 of the Code of Civil Procedure. Section 97 (3) of Act CIV of 1976, declares that except as otherwise provided in sub-section (2), the provisions of the principal Act, in the Civil Procedure Code, as amended by Act CIV of 1976, shall apply to every suit, proceeding, appeal or application, pending at the commencement of the Act or instituted or filed after such commencement. In the present case, the proceedings, out of which the civil revision petition arises have been instituted in 1980 long after the coming into force of the provisions of the Code of Civil Procedure (Amendment) Act CIV of 1976, and consequently, the amended provisions of Order 20, rule 11 (2), Cvil Procedure Code, would apply to the instant case. Though the judgment-debtors had made an application for a direction that the decree amount should be made payable by instalments, yet, the petitioner, as decree-holder, had opposed the same and therefore in the instant case, the decree-holder has not consented to the payment of the decree amount in instalments, which is a vital condition as per the amended provision. In the absence therefore, of consent on the part of the petitioner, the Court below acted with material irregularity in extending the time for payment of the balance of the decree-amount in six instalments. The order has therefore to be set aside.

N. Venkataraman, for Petitioner.

Miss K. Manjula, for Respondent.

R.S. — *Civil revision petitions allowed.*

G. Ramanujam and
R. Sengottuvelan, JJ.

M. V. Chockalingam Pillai *v.*
Alamelu Ammal.

3rd December, 1980.

L.P.A. No. 32 of 1976.

Hindu Succession Act (XXX of 1956), *section* 14 (1); *Hindu Womens' Rights to Property Act (X of* 1937), *section* 3 (2) *and* (3)*—Death of male Hindu in* 1942 *having interest in joint family property leaving wife, son, and a daughter—Wife dying in* 1963*—Impact of section* 14 (1) *on interest taken by widow under section* 3 (2) *of Act* XVIII *of* 1937*—Daughter's claim to one-fourth share, if tenable.*

According to section 3 (2) of the Hindu Womens' Rights to Property Act, XVIII of 1937, where a Hindu died leaving at the time of his death an interest in joint family properties, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had. The interest the husband had in the property was a half share of the family properties and that half share devolved on his widow on his death. Of course, this right was subject to sub-section (3), which stated that the widow did not become the absolute owner, but she should have only a limited interest known as a "Hindu Woman's estate". A conjoint reading of both sub-sections (2) and (3) of the Act would clearly indicate that the widow shall have in the property of the joint family the same interest as the husband himself had. Of course the right is curtailed to the extent indicated in sub-section (3). In this case, the plaintiff's mother had not asserted her rights or worked out her rights by filing a suit for partition during her lifetime. But the question is not as to what she did or did not do during her lifetime but as to what was the interest she had on the date of the commencement of the Act XXX of 1956. Admittedly on that date she had the same interest in the suit property as her husband had at the time of his death. It is not in dispute that the husband had a half share in the suit properties at the time of his death. The half share devolved under section 3 (*a*) of the Act, on the plaintiff's mother. The interest which she acquired had not been lost by her or extinguished on the date of the commencement of the Central Act XXX of 1956. The question whether she lost her right by not filing a suit for partition during lifetime will arise only if section 14 (1) had not intervened in the meanwhile. If, section 14 (1) had operated even before her death, in 1963, then, there is no question of any rule of survivorship applying. On the date when section 14 (1) came into operation, admittedly, the plaintiff's mother had in the suit properties, the same interest as her husband had, that is the half share.

It connot be disputed that in a joint family possession of the joint family properties by one coparcener is for the benefit of all the coparceners. Therefore the first defendant (the son) and his mother should be taken to have been in joint possession of the properties. Even a joint interest owned by the Hindu widow and her joint possession will attract the operation of section 14 (1) of the Act, unless it is possible to say that on the date of the commencement of the Act, the widow had no interest in any of the joint family properties. It is also well-settled that the word "possession" occurring in section 14 (1) does not mean only physical possession but includes also legal possession. If the first defendant and his mother can be taken to be in joint possession, under law, then such interest and joint possession of the plaintiff's mother in the suit properties will be enlarged into an absolute estate under section 14 (1) of the Act. The daughter's claim is therefore justified.

T. R. Venkataraman, for Appellant.

N. Varadarajan, for Respondent.

R.S. ——— *Letters patent appeal dismissed.*

K. Shanmugham, J.

Sudalai Muthu Pillai *v.* Santhanam.

21st November, 1980.

S.A. No. 1419 of 1977.

Indian Partnership Act (IX of 1932), section 69 (1) and (3) (a)—Scope—Unregistered agreement of partnership—Suit for recovery of specific sum of money against the other partner—Not maintainable.

Section 69 (3) (*a*) of the Partnership Act, shows that notwithstanding the prohibition contained in section 69 (1), an unregistered partnership agreement could be enforced for obtaining only three reliefs and no more;

(*i*) to apply for dissolution of the firm and for accounts;

(*ii*) to ask for accounts of a dissolved firm; and

(*iii*) to realise the property of the dissolved firm.

The present action for recovery of a specific sum of money from the other partner as framed would not come under the first two of the categories abovesaid. As to whether it will be within the third category, the reference to "the power to realise the property of the dissolved firm" in section 69 (3) (*a*) can be only for the benefit of the other partner or partners but not for one's individual benefit. In such a suit the partner or partners should also be made parties. This is a safeguard envisaged under the sub-section to enable any partner of the dissolved firm, in case of non-co-operation from any other partner, to recover from the third party the property of the dissolved firm for the benefit of all the partners. Even a strained interpretation of the said clause can hardly import the meaning that the third category embraces a case where a partner of the dissolved firm can sue the other or others for a specific sum of money. The relief should be one for accounts of the dissolved firm under the second category, but not for recovery of a specified sum.

K. Raman, for Appellant.

V. C. Srikumar, for Respondent.

R.S. ——— *Appeal dismissed.*

M—N.R.C.

V. Ratnam, J.

N. Venkatachalapathy *v.* Saroja *alias* Thangammal.

27th November, 1980.

C.R.P. No. 2400 of 1980.

(A) *Hindu Marriage Act (XXV of* 1955) (*as amended by Act LXVIII of* 1976), *section* 13 (1) (b)—*Petition for divorce by husband against wife—Direction sought for wife to appear in Court and submit herself to medical examination—Allegation of her having infantile uterus—Petition dismissed.*

(B) *Civil Procedure Code* (*V of* 1908), *section* 151—*Cannot be invoked for an order for compulsory medical examination.*

When the petitioner had an opportunity to let in medical evidence to establish the condition of his wife—respondent of having an infantile uterus as claimed by him but took no steps and had taken the definite stand that he was not going to examine any doctor, he should be taken to have not established that his wife had infantile uterus and hence his interlocutory application in the lower appellate Court to direct the wife to submit to medical examination was rightly rejected as frivolous.

It is settled law that a person cannot be dierct-ed to be examined medically against her wish. Since the respondent has opposed the application of the petitioner and also denied the defects in her, it was clear that any medical examination, if ordered, would only be against her wish, which cannot be done. Though the Courts below had not proceeded on this ground, yet the dismissal of the application by the learned District Judge could be sustained on this ground as well.

R. G. Rajan, S. Ethiraj and *D. Sekar,* for Petitioner.

K. Raman and *R. Sitaraman,* for Respondent.

R.S. ——— *Revision petition dismissed.*

S. Natarajan and
V. Sethuraman, JJ.

Seniappa Gounder *v.*
V. K. Venkataraman.

20th January, 1981.

A.S. Nos. 647 of 1976
and 1025 of 1980 and
C.M.P. Nos. 7257 and
12798 of 1980.

(A) *Election, doctrine of — Meaning and scope — Specific performance — Suit for — Suit decreed—Appeal by first defendant — Deposit of balance of sale consideration in Court by plaintiff—Execution of decree for costs by plaintiff—First defendant referring to huge amount in Court deposit to his credit and that plaintiff could proceed against that — Preliminary objection of first defendant's averment amounting to election to treat the deposit in Court as his money and precluding appeal by him—Objection overruled.*

(B) *Doctrine of election—Theory of approbate and reprobate—Sope and applicability.*

The doctrine of election belongs to the species of estoppel. The test is whether there is any inconsistent intention or conduct on the part of the appellant to approbate the judgment appealed against by taking a benefit therefrom and to reprobate the judgment by appealing against it. There is in the present case, no actual benefit taken by the appellant. He merely pointed to the existence of a large amount in Court, so that there was no need to proceed against any amount due from third parties by way of attachment or otherwise. The doctrine is a rule of equity and equity would not at all be served by applying it to the facts here.

The question is whether the first defendant having pointed to the existence of a large amount in Court deposit at the time of executing the decree for costs was precluded from prosecuting his statutory right of appeal. An appeal does not operate as a stay of proceedings of the decree or order appealed from, except so far as the Appellate Court may order, nor does an execution of a decree get stayed by reason only of an appeal having been preferred from the decree; Vide Order 41, rule 5 (1) of the Code of Civil Procedure. Section 144 has been enacted only for the purpose of granting restitution in a case where a decree might have been executed during the pendency of an appal against it, and the decree so executed was set aside an appeal partially or totally. The appellate jurisdiction is a statutory one and so long as there is in the statute no restriction upon the jurisdiction of the Court, it would be stultifying a right of appeal if it is to be held that the appeal is incompetent. The exception to this principle is to be found only in those cases where the plaintiff has made an election and with full knowledge of his legal rights has abandoned his right of appeal. The rule of election is a rule of equity and neither justice nor equity is promoted by the acceptance of the contentions of the plaintiff in this case. The first defendant is not disentitled from prosecuting the appeal.

Kesava Iyengar, for Appellant.

S. Gopalarathnam, for Respondent.

R.S. ——— *Preliminary objection overruled.*

V. Ratnam, J.

Muthulakshmi *v.* Swaminathan.

26th March, 1981.

A.S.S.R. No. 8468 of 1981.

Limitation Act (XXXVI of 1963), *section* 12 (2) *and* (3)—*"Time requisite" — Meaning of—Three days time granted to litigant under rule* 129, *Civil Rules of Practice deemed to be "time requisite".*

Under section 12 (1) of the Limitation Act the day from which the period is to be reckoned for an appeal or application etc., stands excluded. Section 12 (2) excludes the day on which the judgment was pronounced from entering into the computation. It also excludes the "time requisite" for obtaining a copy of the decree or order appealed from or sought to be reviewed or revised. Section 12 (3) provides that the "time requisite", for obtaining a copy of the concerned judgment shall be excluded. Rules 129 and 123 of the Civil Rules of Practice provide for the deposit of stamp papers and printing charges respectively with reference to applications for certified copies of the judgment and decree and the printed copies as well.

The judgment appealed against in this case, was delivered on 17th April, 1980, and an application for certified copies of the judgment and decree was filed on 19th April, 1980. The copy stamps required for complying with the application were called for on 3rd September, 1980, and deposited on 6th September, 1980. The certified copies were made ready on 4th November, 1980, taken delivery of on 5th November, 1980, and the appeal was presented on 31st January, 1981. As to whether the appeal presented was in time,

Held: The established practice of this Court, as revealed by the office note, is to deduct a period of two days from the date when the copy stamps were called for to the date when the copy stamps were furnished irrespective of the nature of the copy *viz.*, certified copy or printed copy of the judgment or a certified copy of the decree accompanying the memorandum of appeal. It has also to be noted that the endorsements usually made on the copies furnished to litigants do not disclose the time allowed for furnishing the copy stamps or for payment of necessary charges.

As per rule 129 of the Civil Rules of Practice, every day, between the hours of 3 P.M. and 5 P.M. a list showing the applications in which the records have been received and the number of stamp papers required, shall be prepared and affixed to the Court's notice board. Such list shall remain suspended for three days, or if the last day is a holiday, till the next Court day. If the required stamp papers have not been deposited by 3 P.M. on the fourth day, counting that on which the list was suspended or, if the fourth day, is a holiday, then the next Court day, the application shall be struck off. This rule therefore contemplates that the copy application should be kept with the office at least for three working days after stamps are called for and during this period, the copy application is neither returned to the party nor struck off. The granting of three days time to furnish stamp papers after notice or intimation cannot therefore be stated to be time lost by a party owing to his carelessness or negligence or laches, but should be regarded as time requisite to enable the Court to get ready the copies. If the copy stamps are furnished the next day, then no difficulty at all arises. In cases where the litigant furnishes the copy stamps required on the third day, his having taken that time cannot be attributed to any negligence or laches on his part as that time is made available by the Rules. The totality of the period of three days permitted under rule 129 of the Civil Rules of Practice would also fall within the category of "time requisite" within the meaning of section 12 (2) and (3) of the Limitation Act of 1963. The three days time granted to the litigant to furnish copy stamps should be deemed to be "time requisite" and cannot in any manner, be attributed to the default or negligence or laches on the part of the applicant so as to disentitle him from claiming the benefit of exclusion of the entirety of those three days.

Under these circumstances, in the present case excluding 5th and 6th September, 1980, also as "time requisite", the appeal should be in time. The office is directed to number the appeal.

R.S. — *Appeal held to be in time.*

V. Ratnam, J.

R. Sundaresan *v.*
A. Ramachandran and Co., by partner, Ramachandran.

30th March, 1981.

C.M.A.S.R. No. 17735 of 1981.

(A) *Tamil Nadu Debt Relief Act (XL of* 1979), *section* 25—*Applicability* — Ex parte *decree passed in a suit—Application to set aside the decree under the provisions of the Act — Application dismissed — Civil Miscellaneous Appeal to the High Court, if maintainable.*

(B) *Civil Procedure Code (V of* 1908) *(as amended by Act CIV of* 1976), *sections* 2 (2) *and* 47—*Decree—Meaning of.*

Stemming from a statute a right of appeal is a substantive right and any provision conferring such a right should be interpreted with a liberality which would favour an appeal being entertained rather than a stringency that would defeat it. The words of section 25 of the Tamil Nadu Debt Relief Act (XL of 1979) are clear and in favour of an appeal. There is no ambiguity. The use of the words "as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure", clearly indicates that as a result of a fiction the effect of an adjudication under the provisions of the Act is placed on a par with that of a decree which, otherwise it is not.

The use of the words "as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure" in section 25 (1) of the Tamil Nadu Debt Relief Act (XL of 1979) clearly indicates that though the effect of the order passed under the Act is not that of a decree and even if the effect of an adjudication under section 47 of the Code, is taken outside the scope of the definition of a decree under section 2 (2) such an adjudication shall nevertheless be treated as a decree, though in fact and also in law it is not. It must also be noticed that the application in the present case has been filed in the suit itself and if the order on such application satisfies the characteristics of a decree, the mere fact that the order is deemed to be one passed under section 47, Code of Civil Procedure, which as a result of the amendment is taken out of the category of decrees as defined in section 2 (2), Code of Civil Procedure, would not be of any consequence.

S. Jagadeesan, for Petitioner.

R.S. — *Appeal held to be maintainable.*

P. R. Gokulakrishnan, OCJ. and
P. Venugopal, J.

N. Kailasam *v.*
The Secretary to
Government of Tamil Nadu
Home (Cinema), Fort St.
George, Madras-9.

8th April, 1981.

W.A. No. 687 of 1980.

Tamil Nadu Cinemas (Regulation) Act. (IX of 1955), *section* 11—*Semi-permanent theatre —Construction of — Grant of no-objection certificate—Time given for construction — Theatre not constructed within time—Extension of time applied for and granted—Grant of extension questioned—Power under section* 11, *a continuing power—Extension permissible —No need to hear third parties.*

The power under section 11 of the Tamil Nadu Cinemas (Regulation) Act, will not get exhausted with the grant of one exemption and it is a continuing power. There is no need for giving an opportunity to any third party before such grant of exemption by the Government under section 11.

The fact that in the first order granting exemption it is stated that no extension of the period of execution will be granted on any account and that the third respondent will have to apply afresh for a no-objection certificate, cannot restrict the powers of the Government under section 11, nor will such condition give any right in favour of any third party.

N. S. Sivan, V. Vibishanan and *K. Madhavan,* for Appellant.

A. Kalyanasundaram and *B. Venugopal,* for Respondents.

S.J. —— *Appeal dismissed.*

V. Balasubrahmanyan, J.

Govinda Gounder v.
Deenappa Gounder.

4th February, 1981.

C. R. P. Nos. 3200 and
3201 of 1978.

Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Rules (1956), *rule* 10—*Fixation of fair rent — Application by landlord — Fair rent fixed by Rent Court — Appeal to Rent Tribunal both by landlord and tenant — Remand by Rent Tribunal to Rent Court on ground of failure of landlord to produce Gazette notification regarding market value of the produce — Revision by landlord against remand—Status of Rent Tribunal—Scope of enquiry by the Tribunal — Remand set aside with direction to Rent Tribunal to go into all the details.*

A landlord owning 1·90 acres of land filed a petition before the Rent Court for fixation of fair rent under section 9 (1) of the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Act, 1956. The Rent Court fixed the fair rent after an enquiry. Against this both the landlord and tenant filed appeals before the Rent Tribunal. The Rent Tribunal after hearing both the parties set aside the order of the Rent Court and remanded the matter for fresh enquiry. The principal reason for this remand was that the landlord had failed to produce the Gazette notification regarding the market value of the produce during the relevant period and he had also failed to examine any of the landowners of adjacent lands. On a revision by the landlord before the High Court against the remand order contending that the Rent Tribunal should have gone into the details,

Held : The Rent Court and the Rent Tribunal under the Madras Act XXV of 1955, notwithstanding that their names have a judicial flavour about them, are not even pseudo — Courts. Having regard to the nature of their power and to the avowed objectives of the Act, their jurisdiction is of an administrative nature rather than of a judicial nature. While it may be proper to bring the inquiry into fair rent within the generic classification of "quasi-judicial" inquiry, the emphasis must be more on "quasi" than on "judicial".

The rent under the Act had to be fixed by the Rent Court or by the Rent Tribunal as the case may be, in terms of the formula

laid down by section 4 of the Act. Under rule 10 of the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Rules, the Rent Court or the Rent Tribunal has to go into the accounts of landowners, intermediaries and cultivating tenants, whether or not they were called in evidence at the instance of one or other of the parties. If the parties call them to the witness-box, well and good. But if they do not, it would still be the bounden duty of the Rent Court or the Rent Tribunal to call for their evidence, if it thought it would be relevant and it would assist the determination of the fair rent in the given case.

The remand made by the Rent Tribunal in this case was not either in the proper exercise, or on a proper understanding of its function as an appellate authority under the Act. The order has accordingly to be set aside. The Rent Tribunal should go into the question of fair rent on its own. It is needless to say that at the rehearing of the appeal, both the parties would be at liberty to place before the Tribunal such further materials as they might think fit. Whether or not they do so, the Tribunal was under a duty to go into the question bringing to bear all its powers both under the Act and under the statutory rules.

S. Palaniswami, P. Navaneetam and *K. Soundararujan*, for Petitioners.

G. M. Nathan, M. B. Dominique, C. Ramanathan and *S. Ettika*, for Respondent.

S. J. —— *Revision allowed.*

V. Balasubrahmanyan, J.

Srinivasan (Minor) by K. Kempu Chettiar *v.* S. S. Arumugam.

28*th January*, 1981.

C.R.P. No. 1103 of 1979.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 19—Non-residential building — Petition for eviction — Owner's occupation — Notice under section 106 of the Transfer of Property Act not issued — Petition dismissed on this ground — After two or three years landlord filing another petition on the same grounds — Rent Controller allowing petition for eviction on merits — Appeal by tenant — Tenant setting up plea of res judicata *under section 19—Appellate Authority upholding tenant's contention — Revision by landlord — Test of* res judicata *— Held, present proceedings not barred by* res judicata.

'*S*' was the owner of a non-residential building under the tenancy of '*A*'. *S* filed an eviction petition against '*A*' on the ground that the building was required to house a business of his own. This was dismissed on the ground that no notice to quit under section 106 of the Transfer of Property Act was issued to the tenant prior to the petition. The Rent Controller did not go into the merits of the petition at all. Two or three years later '*S*' filed another petition for eviction against '*A*' on the same ground. This time the Rent Controller went into the merits and ordered eviction. The tenant appealed and contended that the present proceedings were barred by *res judicata* under section 19 of Act XVIII of 1960. The Appellate Authority agreed with the tenant and dismissed the petition for eviction. On revision by the landlord to the High Court,

Held: For seeing whether the present proceeding is or is not barred by *res judicata*, the correctness or incorrectness of the decision in the former proceeding need not be examined. What has to be seen is whether the same substantial issue raised between the parties had been disposed of on merits in the former proceeding. The inquiry in this sense might well be regarded as one on a question of fact touching the factum of disposal of the issue in the former proceeding rather than on a question of law as to whether the decision was correct or not. *Res judicata* proceeds on the principle that in the interests of the parties themselves it would be expedient to stifle, rather than countenance further discussion of the controversies which had been thrashed out in the earlier encounter.

While the issue as to *bona fide* requirement for personal occupation was an issue both in the former proceeding and in the present proceeding that issue was not decided at all in the former proceeding. While the disposal of the former proceeding was solely on the issue of notice to quit, no such issue at all figured between the parties in the present proceeding. Either way, therefore, section 19 did not apply to the present case. The appellate authority was in error in summarily rejecting the present eviction petition as barred by *res judicata* under that provision.

M. N. Padmanabhan, for Petitioner.

T. R. Rajagopalan, for Respondent.

S.J. —— *Revision allowed.*

V. Balasubrahmanyan, J.

Parvatham Muthu v. Union of India.

17th February, 1981.

C.R.P. No. 2076 of 1978.

Indian Railways Act (IX of 1890), section 78-B—Scope and applicability—"Charge and overcharge"—Meaning of—Goods booked from Punalur to Coimbatore—Delay in unloading the goods by the consignee—Claim for demurrage and wharfage by the Railway from the consignee—Amount paid by consignee under protest—Suit for refund of amount paid—Allegation of delay only on the part of the Railway in not placing wagon in a position for unloading—Notice of overcharge not given within six months—Effect—Claim for refund held untenable.

Section 78-B of the Indian Railways Act is couched in a negative form providing that a person shall not be entitled to a refund of overcharges in respect of goods carried by Railways unless the claim to refund was preferred within six months from the date of delivery of goods carried on by the Railway. Section 78-B has been put into the statute book, obviously with a view to avoid litigation, if it could be avoided, between owners of the goods which are carried by the rail roads and the railways which undertake the carriage of such goods. It was apparently expected that the claims of owners for refund or compensation for loss might get settled this side of the law Courts if the Railways had a chance of knowing the basis of such claims. No wonder, then, that the Legislature has used fairly wide language in enacting the provisions. This is indicated by such words in the section as "in respect of". The legislative coverage is enacting section 78-B of the Railways Act on the subject of overcharge must necessarily be held to be wide, because the section speaks of "overcharge *in respect of* goods carried by the railways". The Railways charge for carriage of goods, and might on occasion, overcharge the levy for such carriage. The Railway also does incidential things to goods carried, like allowing them to be left or kept in the goods shed. For these other services also, the Railway charges, and on occasion, it may overcharge. The expression "overcharge in respect of goods carried by the railway" can therefore be regarded as comprehending excess charges of all kinds levied by the Railway in respect to the goods carried.

Thus excess wharfage and excess demurrage collected by the Railway must be classed as overcharges "in respect of" the goods carried by the Railway even though they are not charges levied for actual carriage of goods over the rail tracks but only terminal levies. The expressions "charge" as well as "overcharge" are properly employed only with reference to actual quantum of liability, and they cannot be applied to relate the rates of charges. For the rate structure is only a measuring rod for the charge and cannot itself be the charge. The question to be asked under section 78-B is whether the claim against the Railway is for an overcharge. The answer will be in the affirmative in two situations. There will be an overcharge if the railway applies a higher rate than is appropriate. There can be also an overcharge, where, even at a rate which itself is not open to objection, there is yet an excessive liability foisted by the railway. It is not possible to restrict the expressions overcharge only to the former kind of case where the railway applies a higher rate than that which the law allows. In the instant case, in view of the delay being found to be only 14½ hours as against 73 hours asserted by the Railway, the demurrage collected as for 73 hours delay is a typical case of overcharge and section 78-B clearly applies to the case. The petitioner ought to have sent a notice to the railway under section 78-B for the suit claim within 6 months; notice was sent beyond that time-limit. Hence the suit was incompetent.

J. Kanagaraj, for Petitioner.

P. S. Srisailam, for Respondent.

R.S. ——— *Petition dismissed.*

V. Ratnam, J.

Annamalai Chettiar *v.* The Union of India.

1*st April,* 1981.

A.A.O. No. 7 of 1980.

Civil Procedure Code (V of 1908), *section* 20 (c)—*Indian Railways Act (IX of* 1890), *section* 80—*Jurisdiction—Goods booked at Boodalur Railway Station of Southern Railway to Naya Bazaar Railway Station of Northern Railway — Consignment found at destination in a damaged condition—Certificate showing assessment of damages obtained —Suit by consignor against the General Manager, Northern Railway for damages — Suit instituted in Sub-Court, Thanjavur—Sub-Court, Thanjavur, if competent to entertain the suit.*

Section 80 of the Indian Railways Act was substituted for the then existing provision by Act XXXIX of 1961, and it provides a complete and self-contained Code regarding the Courts before which the suit referred to in that section can be instituted. Section 20 of the Code of Civil Procedure, had been in existence at the time when section 80 of the Indian Railways Act, was substituted by Act XXXIX of 1961, and even so, the Parliament thought fit to provide for the institution of suits claiming compensation against railways only before certain Courts under the circumstances set out in section 80 of the Indian Railways Act. If it had been intended that section 20 of the Code of Civil Procedure should continue to be applicable even with reference to the institution of such suits claiming compensation against Railways, there was no need for specifying and enumerating in section 80 such Courts before which alone, suits claiming compensation and referred to in section 80 could be filed. Both section 20, Civil Procedure Code and section 80 of the Railways Act, cannot co-exist and be given effect to for the purpose of institution of suits claiming compensation against Railways. The provisions of section 20, Civil Procedure Code, were in force at the time when section 80 of the Railways Act, was enacted and the object of section 80 of the Railways Act, was to specify the Courts having jurisdiction to try suits for compensation and to this extent the provisions of section 20 of the Code of Civil Procedure, have to be read as not being applicable to suits falling under section 80 of the Railways Act, after the coming into force of section 80 of the Railways Act introduced by Act XXXIX of 1961.

The Civil Procedure Code, contains general provisions with reference to the jurisdiction of the Courts in respect of institution of suits. The provision under section 80 of the Railways Act, has been enacted thereafter in 1961, and, the two provisions cannot stand together particularly when the Parliament had in mind the provisions of the Code of Civil Procedure, when it enacted section 80 of the Railways Act, and it may even be stated that section 80 of the Railways Act, is an exemption to section 20 of the Code of Civil Procedure, with reference to the institution of suits claiming compensation against Railways.

The Sub-Court, Thanjavur did not have any jurisdiction to try the suit in the instant case.

S. Sundaresan and *N. Thirunavukarasu,* for Appellant.

P. S. Srisailam, for Respondent.

R.S. ——— *Appeal dismissed.*

. Ramanujam and
..enugopal, JJ.

C. V. Ranganathan *v.* The Union of India.

13*th February,* 1981.

W.P. Nos. 4118, 5106 and 5107 of 1979 and 730 to 732 of 1980.

(A) *Government of India Act,* 1935 (26 *Geo. V and* 1, *Edw. VIII, C.* 2), *7th* Schedule, *List III, Entry* 1—*Prevention of Corruption Act* (*XXI of* 1947), *section* 1—*Government of India Act* (1915) (5 *and* 6 *Geo. V, Ch.* 61), *section* 124—*Indian Penal Code Code* (*XLV of* 1860), *section* 163—*Criminal Law Amendment Act* (*XLVI of* 1952)—*Constitution of India* (1950), *Schedule 7, List III, Entries* 2, 46.

(B) *Prevention of Corruption Act not a special law relating to Public Servants — Creates new offences of misconduct—Falls within the expression "Criminal law"—The "pith and substance" of the Prevention of Corruption Act is "Criminal law" — Section* 163, *Indian Penal Code not repealed by section* 124 *of the Government of India Act,* 1915—*Constitution of Special Courts under Criminal Law Amendment Act* (1952)—*Entry 2 of List III read with Entry* 46 *of List* III *of 7th Schedule to the Constitution of India* (1950) *confers jurisdiction.*

Having regard to the object sought to be achieved by the Prevention of Corruption Act (1947), it cannot be said to be a special law relating to public servants. It is true that a new offence of misconduct has been created under the 1947, Act but on that account it cannot be said to be a law relating to public servants. The law relating to a new offence may have an effect on the public servants, but the subject-matter of the legislation cannot be said to be public servants. The 1947 Act, so far as it creates a new offence of misconduct, will fall within the expression "Criminal law" though the impact of the law is mainly on the public servants. The constitutionality of a law can be decided only with reference to the subject it deals with and not with reference to its incidental effect.

Taking note of the subject-matter of the 1947 Act, it can be taken to fall only under Entry 1 of List III (of the Seventh Schedule to the Government of India Act, 1935) which is in respect of Criminal law including all matters included in the Indian Penal Code. Merely on the basis that it has affected all public servants who may be comprehended either under Entry 8 of List I, or Entry 6 of List II its subject-matter cannot be said to be other than Criminal law. The power to legislate on Criminal law under Entry I of List III includes the power to legislate in respect of all persons whether they are public servants or not. "Criminal law" under Entry I of List III cannot be restricted to mean criminal law not affecting public servants. The Entry in a List has to be given a wide and liberal interpretation so as to include within its scope all ancillary and incidental matters. Therefore, the 1947 Act should be taken to be a law made only under Entry 1 of List III of the 1935 Act and it cannot, in any sense, be taken to be a law under Entry 8 read with Entry 42 of List I.

Though section 124 of the Government of India Act (1915) created an offence of misdemeanour and provided for punishment therefor, it is not possible to infer therefrom an implied repeal of section 163, Indian Penal Code. Section 124 of the 1915 Act can only be taken to be a law supplementing section 163, Indian Penal Code. The offence created under section 124 of the 1915 Act is a separate offence and the ingredients also are different from those in section 163, Indian Penal Code. The scope of section 124 of the 1915 Act is considerably wider. Therefore the creation of a separate offence with separate ingredients in section 124 of the 1915 Act cannot result in the implied repeal of section 163, Indian Penal Code.

Entry 2 of List III (of the Seventh Schedule to the Constitution of India (1950) along with Entry 46 of List III will clearly comprehend a legislation for constitution of Courts and conferment of jurisdiction and powers on those Courts.

P. Subramanian, for Petitioners.

Advocate-General, for Respondents.

S.J. ——— *Petitions dismissed.*

V. Ratnam, J.

N. Devarajan *v.*
D. V. Munirathanam.

24th February, 1981.

C.R.P. No. 2238 of 1980.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 23 (3)—*Eviction petition—Wilful default as to payment of rent—Petition ordered by Rent Controller — Appeal by tenant — Pending appeal house sold by landlord — Purchaser filing application before Appellate Authority to be brought on record as a Respondent—Appellate Authority allowing request of purchaser —Order whether correct—Revision by tenant —Appellate Authority can allow purchaser to come on record under section* 23 (3).

The landlord filed a petition for eviction against the tenant on the ground of wilful default in payment of rent. The Rent Controller allowed the petition. The tenant appealed before the Appellate Authority. Pending appeal the landlord sold the house. The purchaser filed an application before the Appellate Authority to be brought on record as a Respondent. The petition was allowed by the Appellate Authority. The tenant filed a revision challenging the correctness of the order of the Appellate Authority.

Held: The exercise of the jurisdiction by the Appellate Authority in the hearing of an appeal under section 23 (3) of Act (XVIII of 1960) involves the giving of an effective and adequate opportunity to the parties and if a party who is likely to be affected by the result of the appeal is not heard, then the Appellate Authority may not be exercising its jurisdiction in the matter of hearing the appeals under section 23 (3) of the Act in accordance with the statutory provisions. In order, therefore, to decide the appeal, the Appellate Authority under section 23 (3) of the Act should hear the parties and in order to hear parties, the parties interested in the subject-matter of the dispute must be before it. In order to do so, the Appellate Authority would be entitled to insist that the parties interested should be brought on record and in this context, the power of the Appellate Authority to do so is really part of the power to hear the appeal itself.

In order that the Appellate Authority may effectually adjudicate upon the correctness or otherwise of the order of the Rent Controller, the presence of the landlord as well as the tenant before the Appellate Authority is essential. A mere change in the landlord cannot by itself terminate the proceedings initiated already. The devolution of interest of the landlord who had earlier commenced proceedings against another will merely result in the substitution of one landlord for the other and would not terminate the proceedings.

The Appellate Authority has not only the power to implead the Respondent herein as a party to the proceedings in order to effectively adjudicate upon the controversy between the parties, but the respondent has also the right to take advantage of the order of eviction secured by his predecessor-in-interest especially when the purchase by the respondent has not in any manner been disputed by the petitioner and it is not the case of the petitioner that there was any contract to the contrary.

T. P. Sankaran, S. Sureshkumar and *G. M. Akbar Ali,* for Petitioner.

Lakshmanan and *Alagappan,* for Respondent.

S.J. ——— *Petition dismissed.*